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REPORTS

OF

Cases in Law and Equity

DETERMINED IN THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

BY OLIVER L. BARBOUR, LL. D.

VOL. XXVIII.

ALBANY:

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DURING THE YEAR 1859.

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" 3. THOMAS W. CLERKE.
" 4. JOSIAH SUTHERLAND.
" " DANIEL P. INGRAHAM.

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" 3. JAMES EMOTT.
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4. THOMAS A. JOHNSON.

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" 2. BENJAMIN F. GREENE.*
" 3. RICHARD P. MARVIN.
" 4. NOAH DAVIS, JUN.

LYMAN TREMAIN, *Attorney General.*

* Presiding Justice.

† Sitting in the Court of Appeals.

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CASES

Law and Equity

IN THE

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OF THE

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GREEN vs. THE HUDSON RIVER RAIL ROAD COMPANY.

At common law, an action by a husband, for the loss of his wife who is killed by the careless and negligent act of a third party, can only be sustained where some period intervenes between the time of the injury and the time of her death, during which the husband can be said to have suffered the loss of her services and society, and incurred expense, and endured anxiety and distress on her account.

Where death is the concomitant of the collision occasioning the injury, and life departs at the instant the shock is received, no action for loss of service can be sustained by the husband of the deceased, because there is no time, during her life, when it can be said that the husband has lost the service and society of his wife in consequence of the injury complained of.

DEMURRER to complaint. The material portions of the complaint are set forth in the opinion of the court.

M. S. Miller, for the plaintiff. I. An action at law brought by the plaintiff against the defendant for the loss of service of the plaintiff's wife, who was killed through the negligence of the defendant, will lie upon the principles of the common law. (*Ford v. Monroe*, 20 *Wend.* 210. *Ware's Rep.* 69. *Lynch*

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v. *Davis*, 12 *How.* 322.) The plaintiff, being entitled to the services of his wife during the period of her natural life, is entitled to recover the pecuniary damage he has sustained by the neglect of the defendant, to wit, the value of her services during the period she would have lived had she not been killed by the defendant. (12 *B. Mon.* 450.)

II. Wherever the law gives a right, the law gives a remedy for the wrongful deprivation of that right. *Ubi jus ibi remedium.* (*Broom's Legal Maxims.*)

III. In an action on the case for negligence in driving a carriage, whereby the son of the plaintiff was run over and killed, tried before the Hon. Esek Cowen, he charged the jury that if the defendant was chargeable with negligence, the plaintiff would be entitled to recover such sum by way of damages as they should be of opinion the services of the child were worth until he became of age. The jury found for the plaintiff \$200. The defendant moved for a new trial which was denied, and Nelson, Ch. J., says: "The damages were specially laid in the declaration, and were clearly proved to have been the direct consequence of the principal act complained of, and they therefore came within the well settled rule respecting special damage." (*Ford v. Monroe, supra.*) An action by a husband against a physician for malpractice, which caused the death of his wife, will lie. (*Lynch v. Davis*, 12 *How.* 322.)

IV. So also by the civil law. According to *Grotius, lib. 2, ch. 17*, he who kills another unlawfully is obliged to make amends to those who had a right to be maintained by the deceased, such as his wife, his children, or his parents, according to the value of what they might have expected to receive from him, considering his age, his fortune, and his employment. (*Rutherf. Inst. of Natural Law, b. 1, ch. 17, § 9.*)

V. There is no rule or principle of the English law which will prevent the recovery of damages against a wrongdoer, for loss of service sustained by a husband or parent by reason of the killing of a wife or child, except where the negligence charged amounted to a felony. (1.) The rule of the English

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law being that an injury which amounted to a felony could not be the subject of a civil action, (*Yelv.* 89, 90,) the civil remedy merged in the felony. Thus in *Smith v. Sykes*, (*Freem.* 224,) it was held "that if A. beat the wife of B. so that she dies, B can have no action of the case for that; because it is criminal and of an higher nature." The remedy was by indictment, or formerly by appeal, which the wife might have for killing her husband, provided she married not again. (4 *Bl. Com.* 312. 3 *Id.* 119.) The reason of the rule being that public policy required that the offender should be prosecuted in the criminal courts. Although after acquittal of the defendant upon an indictment for a felonious assault, an action will lie for the civil injury; and after conviction and punishment on an indictment, the party robbed may support trespass against the offender. (12 *East*, 409. 1 *Hall's P. C.* 546.) But by the law of the state of New York, the right of action of any person injured by any felony is not merged or in any way affected by the felony, (2 *R. S.* 292, 746, 700, § 14;) but a person injured by the commission of a felony becomes a creditor of the felon's estate to the extent of his damage, (2 *R. S.* 400, § 14;) and therefore the decisions founded on such reasons will have no weight with the court. *Cessante ratione, cessat et ipsa lex.* (2.) The principle that requires compensation for the death of a freeman is not at all new in history. It was long an institution among our Anglo Saxon ancestors, and perhaps it was never absolutely abolished, but rather died out under the Norman conquest and the centralizing influence of the king's court, which treated all such wrongs as wrongs done to the king, and hence as criminal offenses. * * * A recent statute (9 and 10 *Vict. ch.* 93) seems to have revived the principle of the Saxon law, and allow the relatives of the deceased to recover damages according to the injury resulting to them respectively. (*Lowrie, J., in Penn. R. R. Co. v. McCloskey's Adm'r*, 23 *Penn. Rep.* 529.) (3.) Under the feudal law a practical reason prevented actions of this character. The commission of felony, according to the fundamental principles of

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the feudal law, worked a forfeiture of the feudatory's grant, and the forfeiture extending to the personal property of the felon to the crown, and the crime being punished by death, nothing remained to satisfy a private demand. (*Ware's R.* 69.)

VI. The maxim, *actio personalis moritur cum persona*, does not apply to actions for loss of service, and is sustained only by a class of cases wherein damages for injuries, pain and mental distress, sustained by the person killed, are claimed.

VII. In *Baker v. Bolton*, (1 *Camp.* 193,) which is a hasty *nisi prius* decision, made as late as 1808, not argued by counsel or sustained by any preceding case, or by any subsequent decision in the English courts, the court, overlooking the reason of the law, extended the rule to a case to which it did not apply, and the reporter appends a query to that branch of the decision which applies to this case. In every preceding case cited in the books, to sustain the doctrine that an action will not lie for damage caused by the death of a person, the action is merged in the felony. *Higgins v. Butcher*, (*Yelv.* 89, 90,) was an action by a husband for the battery of his wife so that she died. In *Smith v. Sykes*, (1 *Freem.* 224,) it was held, if A. beat the wife of B. so that she die, B. can have no action on the case for that, because it is criminal and of a higher nature. So also 1 *Levins*, 247; *Vin. Abr.* 74, affirming same doctrine. 1 *Keble*, 487, was an action for placing posts in the highway. It was held that plaintiff must proceed by indictment. *Dawkes v. Cavenigh*, (2 *Roll. Abr.* 557, *Style*, 346,) was an action for money of which the plaintiff was robbed. Held that the action was merged in the felony. In *Markham v. Cobb*, (*W. Jones*, 147, *Noy*, 82, *Leitch*, 144,) it was held trespass will lie after conviction for burglary or felony. 1 *Salk.* 12, action for discontinuing a ferry. Held plaintiff must proceed by indictment. 18 *Noy*, is merely a legal maxim that a personal action dies with the person.

VIII. The only point decided in *Baker v. Bolton* which militates with the position of the plaintiff, is the rule of damages, to wit; that the damages must stop with the period of

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the existence of the wife of the plaintiff, for it is not claimed that the death is a cause of action, but the loss of service. The true rule of damages, which is founded on reason and sound sense is, that the husband is entitled to recover the value of his wife's services during the period which she would have lived had she not been killed. The proposition that if death followed instantly, there was no time during her life when the plaintiff had lost the services of his wife in consequence of the injury complained of, and therefore he cannot recover, whereas if she had lingered six months on her death bed, when it would have been impossible for her to render her husband a particle of service, would be preposterous.

IX. The Massachusetts case, (1 *Cush.* 475,) is founded upon *Baker v. Bolton and others*; and the following decisions, extra-judicial and judicial, 9 *Cush.* 450; *Id.* 109; 1 *Handy*, 481; 14 *B. Mon.* 204; 10 *S. & R.* 31; 15 *N. Y. R.*; 3 *Duer*, 647; 21 *Barb.* 245; 10 *Eng. Law and Eq.* 438, are founded on 1 *Cush.* 1 *Camp.* and therefore of no greater force than 1 *Campbell*;—and 1 *Handy*, 481; 9 *Cush.* 480; *Id.* 109; 3 *Duer*, 647; 15 *N. Y. Rep.* 435; 10 *Eng. Law and Equity*, 438; 10 *Serg. & Rawle* 31, and 21 *Barb.* 215, are cases which arose under the statute, and all decisions therein are extra-judicial, the latter case being decided upon the ground of misjoinder, and the remarks in most of the foregoing cases apply to cases where the action is for the death of the person killed, and not for the loss of service.

T. M. North, for the defendant. At common law no action lies to recover damages sustained by the killing of a human being. (*Higgins v. Butcher*, 1 *Brownl. & G.* 205; *Yelv.* 89, 90. *Baker v. Bolton*, 1 *Camp.* 493. 1 *Chit. Pl.* 69. *Broom's Legal Max.* 702, 4th ed. 565. *Statute 9 and 10 Victoria*, § 1. *Lucas v. New York Central Rail Road Co.*, 21 *Barb.* 245. *Carey v. Berkshire R. R. Co.*, 1 *Cush.* 475. *Skinner v. Housatonic R. R. Co.*, 1 *Am. R. R. Cas.* 442. *Miller v. Umbehover*, 10 *S. & R.* 31. *Eden v. Lex. and Frankfort R. R. Co.*,

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14 *B. Monroe*, 204. *Worley v. Cin., Ham. and Day. R. R. Co.* 1 *Handy*, 481. *Quin v. Moore*, 15 *N. Y. R.* 435. *Safford v. Drew*, 3 *Duer*, 637. *Kearney v. Boston and Worcester R. R. Co.* 9 *Cushing*, 105. *Mann v. Boston and Worcester R. R. Co.*, *Id. ib.* *Hollenbeck v. Berkshire R. R. Co.*, 9 *Cush* 180. *Laws of 1847, ch. 450, § 1.*)

BACON, J. The plaintiff in this case was the husband of Eliza Green, who lost her life on the 9th day of January, 1856, by a collision of the cars on the defendant's rail road. The complaint avers that the deceased became a passenger on the train from Albany to New York, under the usual engagement to be safely carried, and that by the gross carelessness and unskillfulness of the defendant's agents, a collision occurred, by means of which the said Eliza was then and there killed. The plaintiff then avers, that as the husband of the deceased, he has lost and been deprived of all the comfort, benefit and assistance of his said wife, in his domestic affairs, which he might and otherwise would have had, to his damage of fifteen thousand dollars. To this complaint the defendant interposes a general demurrer, that it does not state facts sufficient to constitute a cause of action on the part of the plaintiff.

The case, as thus stated, presents the naked question whether, at common law, a husband can maintain an action for an injury to his wife, where the effect is her instantaneous death, as is conceded to have been the fact in this case. I should hardly have deemed the point one that was susceptible of much discussion; but the question has been seriously presented by the plaintiff's counsel, and sustained by an argument of very considerable force and ingenuity. If this question were now for the first time agitated, I should concede that there is great plausibility, at least, in many of the views taken by the counsel, and that they go far to uphold the right to recover for an injury that strikes the mind as one of the most serious and painful to which we can be subjected, and which, in this particular case, was attended by the loss of a life for

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which no amount of pecuniary compensation can atone. The counsel for the plaintiff insists that the action can be maintained upon the broad principle that there can be no wrong without an appropriate remedy; that the maxim applicable to personal injuries, of the non-liability of the wrongdoer upon the supervening death of the sufferer, has no relevancy to this case; and that as the act of the defendant did not amount to a felony, the civil remedy is in no respect lost or impaired.

But I suppose the question has been too long settled, both in England and in this country, to be disturbed, and that it would savor somewhat more of judicial knight errantry, than of legal prudence, to attempt to unsettle what has been deemed at rest for more than two hundred and fifty years. One of the earliest cases in the books, is *Higgins v. Butcher*, which arose in the time of James the 1st, about the year 1600, and is reported in *Brownlow* and also in *Yelverton*, and cited in *Noy* with approbation. The case is reported in *Yelverton*, 89 and 90, as follows: "The plaintiff declared that the defendant assaulted and beat one A., his wife, on such a day, of which she died such a day following, to his damage, &c. And it was moved by Foster Sergeant, that the declaration was not good, because it was brought by the plaintiff for beating his wife, and that being a personal tort to the wife, is now dead with the wife, and if the wife had been alive, he could not, without his wife, have this action, for damages shall be given to the wife for the tort offered to the body of his wife. *Quod fuit concessum.*" In a note in this case, in *Yelverton*, it is said that as the action was brought to recover damages for the injury to the wife, it is very clear that it could not be supported, and to this effect the case of *Smith v. Sykes*, (1 *Freeman*, 224,) is cited. The next case in the books, did not occur, so far as I can discover, until 1808, and arose before Lord Ellenborough, at nisi prius. It is the case of *Baker v. Bolton et al.* (1 *Camp.* 493.) The action was brought against the defendants as proprietors of a stage coach, on the top of which the plaintiff and his late wife were traveling from Portsmouth to

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London, when it was overturned, whereby the plaintiff was bruised, and his wife so severely injured, that she died about a month after. The declaration, among other things, stated that "by means of the premises, the plaintiff had wholly lost and been deprived of the comfort, fellowship and assistance of his said wife, and had suffered great grief and vexation of mind." Lord Ellenborough instructed the jury that they could only take into consideration the bruises inflicted on the plaintiff, and the loss of his wife's society, and the distress of mind he had suffered on her account, from the time of the accident till the moment of dissolution. "In a civil court," he adds, "the death of a human being could not be complained of as an injury." In a note at the foot of this case it is said, "*Quere*. If the wife be killed on the spot, is this to be considered *damnum absque injuria*?" and clearly it must be so, on the principle announced in the decision. The doctrine thus laid down by Lord Ellenborough has not been questioned in England from that day to this, as a principle of the common law. It is true that the decision was made at *nisi prius*, but it has the sanction of the great name of Lord Ellenborough, and having been followed ever since without dissent, in England, has the authority of a case decided in *banco regis*.

The counsel for the plaintiff suggests, and indeed, strongly insists, that the principle thus adjudged arose out of the feudal law, which would not allow a prosecution for a civil injury, where the act amounted to a felony. The reason for this, is said to be that the crime worked not only a forfeiture of the feudatory grant, but extended also to his personal estate, and the felon being also liable to be capitally punished, there would thus nothing be left to satisfy the private demand. This reasoning is somewhat recondite, and certainly has very little application at the present day.

It is indeed said, in the case in *Yelverton* above cited, by one of the justices, that if a man's servant is beaten so that he dies, the master shall not have an action against the wrongdoer for the battery, because the servant dying, it has now be-

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come an offense to the crown, being converted into a felony, and that drowns the particular offense and private wrong, and the action is thereby lost; and to this, it is said, the other justices agreed. If this could be deemed law 250 years ago, it is not now, to the full extent of the doctrine laid down; for nothing is clearer than that in England the civil remedy is not gone by reason of the criminal offense, since repeated adjudications have settled the rule that after a trial and conviction upon an indictment for a felony, the party is liable to a civil suit for the injury he has occasioned, as he also is where he is acquitted, unless the acquittal was procured by fraud. (*See Latch*, 144; 1 *Hale's P. C.* 5, 6; *Cowsley v. Leing*, 12 *East*, 400.) The offender must first be brought before the criminal tribunals for the crime, in order that the justice of the country may first be satisfied, and after this the way is open for the injured party to seek his civil redress. It may be remarked in passing, that this doctrine has never been recognized in this country. (*Per Parker, C. J.*, 15 *Mass. R.* 336.) And in this state it has been provided by statute, that the right of action of a party injured by a felony, shall not be in any way affected or impaired by the felony. (2 *R. S.* 292, § 2.)

No such reason as the one above stated for the rule, it may be added, is suggested by Lord Ellenborough, although the case before him was one in which it would have been pertinent to have alluded to this peculiar feature of the ancient jurisprudence of the country; but he lays down the broad proposition that in a civil court, the death of a human being cannot be complained of as an injury. If it was necessary at this day to give a reason for this doctrine, I should think it more natural and obvious to refer to the old maxim which has obtained from the earliest days of the common law: "*Actio personalis moritur cum persona.*" In a case which arose in England under the statute of 9 and 10 Victoria, known as Lord Denman's act, at the Derbyshire assizes, before Baron Parker, that learned judge, in summing up to the jury, remarked that until this act, compensation could not be recovered for the death of

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an individual, "the ancient common law maxim being," he said, "that the value of life was so great, as to be incapable of being estimated by money." This admits the existence of the rule laid down by Lord Ellenborough, but it is the first time, so far as I am aware, that such a reason has been suggested for it—a reason, it strikes me, much more fanciful than sound, since there are many wrongs, for the redress of which an action is given, but which the instinctive sense of mankind declares are incapable of being measured by any pecuniary standard which can do more than approach to a compensation.

But without seeking further for the reason on which the rule is founded, it is sufficient for the present purpose, that the rule has long existed in England, and were other proof wanting, the fact is evidenced in the strongest manner by the existence of the statute of 9 and 10 Victoria, before alluded to, and by the recital in the first section, "Whereas, no action at law is now maintainable against a person who, by his wrongful act, neglect or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such cases should be answerable in damages," &c. So good a lawyer as he who drafted this act, would not have put such a proposition in the shape of a legal enactment, nor the parliament of England engaged in a work of manifest supererogation, unless it had been true that by the law of the land, as thus far expounded by its authorities, "Ancient, constant and modern," in the words of Coke, no remedy whatever existed for the wrong for which it was the purpose of the act to provide a remedy.

It can scarcely be necessary to review at any length the cases in this country, which have affirmed the same doctrine. They will be found, with a single exception, I think, to follow the same rule, deriving it indeed from the same source, but affirming in the same manner, its binding authority. The case of *Carey v. Berkshire Rail Road Company*, (1 Cush. 475,) was an action on the case to recover by a wife, for the loss of her husband by the carelessness of the defendant's agents. It was

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not founded on the Massachusetts statute, which had provided a remedy by indictment, and fine, which was bestowed upon the widow and heirs for their indemnity, but was a common law action, seeking a private remedy solely. The court held that the action could not be maintained, and they cite the case of *Baker v. Bolton*, and the principle laid down by Lord Ellenborough, with approbation, and add ; “Such, we cannot doubt, is the doctrine of the common law, and it is decisive against the maintenance of this action.” In *Hallenbeck v. Berkshire Rail Road Co.*, (9 *Cush.* 480,) Ch. J. Shaw incidentally alludes to the same doctrine, and says, “It is perfectly well settled, as a rule of common law, that all rights of action for injury to a person, die with the person, and it was the obvious purpose of the statute to reverse this rule, and provide that the right of action should survive” in the cases to which the statute was made to extend. (See also 9 *Cushing*, 109.) Expressions of a similar character occur incidentally in other reported cases, recognizing either expressly or by implication, the same rule. Thus in *Safford v. Drew*, (3 *Duer*, 637,) Hoffman, J., says: “In the first place, it is to be noticed that by the rules of the common law, before the statute, no action could be maintained by the personal representatives of a deceased person, for loss or damage resulting from his death.” So, also, in *Quin v. Moore*, (15 *N. Y. Rep.* 436,) Comstock, J., speaking of the case of the mother deprived of the services of her son, by the act which destroyed his life, says: “The common law gave no action for this injury. The statute, probably with greater justice, declares a different principle, and holds the wrongdoer liable to make compensation.” But it is needless to multiply citations, since the cases, wherever they allude to this rule, directly or by implication, hold the same language. It may be added, however, that in Kentucky, Ohio and Pennsylvania, decisions have been made either affirming explicitly the same doctrine, or recognizing the unquestioned existence of the common law rule. (See *Edson v. Lex. and Frank. R. Road Co.*, 14 *B. Mon.* 204; *Wesley v. C. H.*

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and *D. R. R. Co.*, 1 *Handy*, 481, and *Miller v. Umbeloven*, 1 *Serg. & Rawle*, 31.)

The case of *Plummer v. Webb, &c.*, cited from Ware's Reports, arising in the United States district court of Maine, to sustain the opposite view, is not in conflict with the common law rule so well established, and recognized so often. It was an action brought by the plaintiff, as the father of a boy who had been cruelly beaten by the defendants, the captain and mates of a ship, the death of the child having resulted from the long continued ill usage he had received. The action was founded on the assault and battery, and alleged loss of service, in consequence of the ill treatment. All the court attempt to decide is, that the remedy for the loss of service did not abate by the death of the child; but this cause of action survived to the parent. The action was not to recover for the death of the child *per se*, but for the loss of service, although if the fact had been established, the death might perhaps have been taken into account, by way of enhancing the damages. It appeared, however, in the case, that the boy had been bound to the service of the captain, and thus the relation on which alone the action was grounded, not existing between the plaintiff and the child, the court ruled that the action could not be sustained. It will be seen, therefore, it is no authority to sustain the principle for which it is cited, and whatever fell from the court on this point was incidental, and not necessary to the decision that was really made in the case.

The only exception then, if exception it can be called, to this uniform current of decisions, is the case of *Ford v. Monroe*, (20 *Wend.* 210.) As it stands, the case is certainly anomalous, sustained by no precedent, and in plain conflict with all previous authority. As the case is stated, the plaintiff was allowed to recover damages for the death of his son, of ten years of age, who was run over and killed by the servant of the defendant, such damages being, among other things, alleged to be the loss of service of the son for upwards of ten years, and the sickness of the plaintiff's wife in consequence of the occurrence.

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What other proof of damage was given does not appear; but as the jury only gave a verdict of \$200, I should infer that the court must have charged on the subject of these special damages claimed, with some hesitation. However that may be, when the case came into the supreme court, the main ground relied upon to obtain a new trial was, that the relation of master and servant was not established, and this the court pass upon as *the* question in the case, and all they say upon the subject of damages, is in four lines, and is merely to the effect that as they are specially laid, and were proved to have been the consequence of the principal act, they came within the well settled rule of special damages; which amounts to little more than saying that they were special, because they were specially laid—a truism that it required no great effort of legal learning to announce. A case thus presented, and thus disposed of, can hardly be accepted as an authority which shall overthrow a principle of the common law, so long settled and acquiesced in as to have become quite elementary. Concerning this case, it is well remarked by Judge Metcalf, in 1 *Cush.* 479, that “no question was there raised concerning the legal rights of the plaintiff to recover damages caused by the killing of his son. For aught that appears, that point was assumed and passed *sub silentio*, both at the trial and in bank.” There is also an incidental reference to this case by Judge Bronson in *Pack v. The Mayor of New York*, (3 *Comst.* 493,) where citing it with an apparent *dubitatur*, he says: “I have a strong impression that the father could recover nothing on account of the injury to the child, beyond the physician’s bill and the funeral expenses.”

I am constrained by these considerations, to reject the authority of this case, and abide by the common law rule, that an action by a husband for the loss of his wife by the careless and negligent act of a third party, can only be sustained where some period intervenes between the time of the injury and the time of dissolution, during which he could be said to have suffered the loss of her service and society, and incurred ex-

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pense and underwent anxiety and distress on her account. Where death is the concomitant of the collision, and life departs at the instant the shock is received, no action for loss of service can be sustained, because there is no time during her life, when it can be said that the husband has lost the service and society of his wife in consequence of the injury complained of. This may be thought a narrow ground on which to place any right of recovery, but there is no other on which the common law rule can be overcome, which declares that the mere death of a human being cannot be complained of as a civil injury, to be compensated in damages.

I should have been happy in this case to have arrived at a different conclusion, but the law will not bend to accommodate our private views, or gratify our personal desires. I have no alternative but to administer the law as I find it—no dispensation from its injunctions to stand by its ancient landmarks. *Non quita movere*, is a good maxim in jurisprudence, however much it may be disregarded in civil and political affairs.

There must be judgment for the defendant on the demurrer, with costs.

[ONEIDA SPECIAL TERM, May 19, 1858. *Bacon*, Justice.]

Note. On appeal by the plaintiff from the above decision, the same was, on argument, affirmed, at a general term of the court held at Syracuse, in January, 1859, and the above opinion of Justice Bacon adopted as the opinion of the court. Present, Justices *Pratt*, *W. F. Allen*, *Mullin* and *Bacon*.

LUCIUS D. HILL *vs.* JULIA A. HILL.

A proceeding in the courts of a sister state, confessedly illegal, cannot, in the absence of any allegation of injurious consequences flowing from it, to the plaintiff, or of any attempt to enforce it in any way in the courts of this state, or of any assertion of rights under it here, be made the foundation of an action in this state simply to have such proceeding declared void.

So held in respect to a decree of divorce, obtained in a state court of Michigan, by a wife against her husband; the husband alleging that he was a resident of this state at the time, and that such decree was obtained by his wife fraudulently and unjustly, and without any service of notice of the proceedings upon him.

THIS action is brought to set aside a judgment of a state court in Michigan, which pronounced a decree of absolute divorce between the present parties, in favor of the wife, against the husband. The relief prayed for in the complaint is, that the aforesaid judgment or decree may be declared null and void, and that the marriage contract between the plaintiff and defendant may be and remain in full force and effect. The complaint alleges the residence of the plaintiff at Cairo, in the county of Greene and state of New York, now and for fifteen years last past; that the parties were married in Cobleskill, Schoharie county, in 1832, and subsequently lived and cohabited together till November, 1853, when the defendant wrongfully left the home and residence of the plaintiff and has ever since remained away wrongfully, and without the consent of the plaintiff; and that he, on or about the 15th day of January, 1855, wrongfully and without the plaintiff's consent left the state of New York and went to the state of Michigan for the sole and wrongful purpose of obtaining a divorce from the plaintiff in the courts of Michigan; and that in February, 1856, he wrongfully and fraudulently commenced proceedings for that purpose in the circuit court or court of chancery for the county of Kent, in that state, and in May 1857, he fraudulently and unjustly obtained therein a decree of absolute divorce, which is now wrongfully and unlawfully remaining in full force and effect. The com-

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plaint further states that the defendant well knowing the plaintiff's residence to be at Cairo during the pendency of said proceedings, and that he had, and would make, a valid defense to the suit in Michigan, wrongfully, purposely and fraudulently concealed from the plaintiff all notice or information of said proceedings. And the complaint avers entire ignorance and want of notice of said proceedings, during the pendency thereof, and that he did not in anywise appear in person, or by attorney, in said action; that the plaintiff has, in fact, a good and substantial defense on the merits to any action for divorce by the defendant, and would have interposed had he been notified of the proceedings; and that the aforesaid judgment or decree of the Michigan court was knowingly, falsely, fraudulently and unlawfully obtained.

The defendant's answer denies all the fraud, wrong and injustice charged in the complaint, and that the plaintiff had, or has, any substantial defense, on the merits, to the action for divorce, and alleges that the proceedings in the Michigan court were in all respects legally and fairly conducted, and that all the publications and notices required by the laws or practice of the courts of Michigan were published and served on the plaintiff, and that the judgment and decree of said court is in all respects legal and valid; and that the court had jurisdiction of the action and of the parties, and lawful and competent power to hear and determine the same, and render judgment therein.

The plaintiff was sworn as a witness in the action, against the objection of the defendant, but testified to no material facts beyond those admitted by the pleadings, except that the defendant left him without his knowledge or consent, and that the proceedings in Michigan were conducted without any notice or information to him, whatever.

K. W. Watson, for the plaintiff.

D. K. Olney, for the defendant.

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HOGEBOOM, J. Assuming every allegation contained in the complaint to be true, I am of opinion that it does not set forth facts sufficient to constitute a cause of action. The case presents the simple question whether a proceeding in the courts of a sister state confessedly illegal, without any allegation of any injurious consequences flowing from it to the plaintiff, or of any attempt to enforce it in any way in the courts of this state, or of any assertion of any rights under it here, can be made the foundation of any action here, simply to declare it void. I do not understand that this can be done. The plaintiff has not been in any legal sense injured. He is just as well off now, as he would be with the judgment of this court in his favor. When his wife asserts some right, or commits some wrong under this decree, to his practical injury, or threatens to do so, it will be time enough for him to institute some suit, or obtain some injunction, or interpose some defense against her. If she marries, or cohabits with, another man, he may prosecute the man, in an action for criminal conversation, or sue her, for a divorce. If she sues him for alimony or the expenses of the Michigan proceedings, he can defend against it. If she attempts to take, or keeps from him, the children of the marriage, he can pursue the proper remedy. In short, if she takes any proceeding under the decree which is injurious to him, he may then properly present the question of its legal validity. At present this suit seems to me altogether premature. If decided in favor of the plaintiff, it can only amount to a judicial declaration that the Michigan proceedings are of no effect in this state. This can be as well ascertained by looking into the law books as by taking the opinion of a judge of this court. No practical effect is to follow. Parties might as well ask the advice of this court about ten thousand proceedings that are daily occurring here and elsewhere. It is not like the case of a bill filed by an owner or purchaser of lands to set aside a fraudulent judgment which is a lien upon the lands and a cloud upon the title. The judgment in this action has never been docketed in this state. I do not see that it

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ever can be. It awards no costs or alimony. It does not appear, if it did, that there are any lands upon which it could operate. In every adjudicated case in this state where the validity of a divorce granted by the courts of a sister state was involved, the question arose upon some attempt by the one party or the other to enforce some practical right under the decree. Thus in *Jackson v. Jackson*, (1 *John*. 424,) the plaintiff prosecuted for *alimony* allowed her under a decree for divorce granted in a foreign state. In *Pawling v. Bird's Executors*, (13 *John*. 192,) the plaintiffs sought to recover *certain moneys* awarded against the defendant's testator under a like decree. In *Borden v. Fitch*, (15 *John*. 121,) the suit was for debauching the plaintiff's daughter, whom the defendant had married, when as the plaintiff alleged he had a former wife living, from which wife, as the defendant contended, he had a valid divorce, by the decree of another state. And in that way the decree came in question in the courts of this state. In *Bradshaw v. Heath*, (13 *Wend*. 406,) the action was for *dower*. The defense was that the plaintiff was not the widow of the owner of the lands, but the wife of another man still living, to whom she had been previously married. In answer to this defense the plaintiff alleged a legal divorce, by the court of a sister state, from such former husband, and in that way and not otherwise the decree of the latter court came in question. And in *Vischer v. Vischer*, (12 *Barb*. 640,) the parties having been married in this state, the husband went to Michigan, and without notice to the wife obtained in the courts of that state a decree of divorce from his wife. He subsequently returned to this state, and married another woman. Then the wife instituted this suit to *obtain a divorce* on the ground of adultery, and it was granted. In all these cases, a proper subject matter of litigation was involved, and the foreign decree was presented, as a matter of evidence to support the prosecution or defense, and not as the direct and substantive cause of action. I think there is no precedent for this action in the past, and that it will afford a dangerous precedent for

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the future if it be countenanced. If every illegal declaration or proceeding, even though it assume a judicial form, be allowed to operate as the foundation for a proceeding in court to set it aside, when nothing has been done to carry it into effect, and for aught we know, never will be, the courts will have more to do than has ever been anticipated. The most that can be said against the defendant is, that she has prepared herself with a weapon with which it is possible she may hereafter attempt to make offensive demonstrations against the plaintiff, but has not yet done so, or threatened to do so. When she makes the attempt it will be time enough to determine whether it has sufficient strength to do any mischief.

The complaint must therefore be dismissed, upon the ground that no practical injury has as yet resulted to the plaintiff, nor any substantial right of his, has as yet been infringed by the defendant. The action is premature, and if adjudicated in favor of the plaintiff must be without practical effect upon his rights and remedies, beyond what he now enjoys.

Complaint dismissed with costs.

[GREENE SPECIAL TERM, June 7, 1858. *Hogeboom*, Justice.]

WASHBURN vs. FRANKLIN.

In an action to recover damages for the non-performance of a contract for the purchase of stock, it is not necessary for the plaintiff to allege, in his complaint, that he was the owner of the stock at the time of making the contract, or that the contract was in writing.

DEMURRER to complaint. The action was brought to recover damages for a breach, by the defendant, of a contract to purchase stock from the plaintiff. The contract was made previous to the passage of the act of 1858 (*Laws*, p. 251,) repealing the statute which prohibited stock-jobbing. The complaint did not aver that, at the time of making the contract, the plaintiff was the owner of the stock, or in pos-

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session of it; nor that the contract was in writing. The defendant demurred, alleging the want of these averments as grounds of demurrer.

———, for the plaintiff.

Chas. T. Sanford, for the defendant.

INGRAHAM, J. The defendant demurs to the plaintiff's complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The action is upon a stock contract, and the defendant's objection to the complaint is that it does not aver that the plaintiff was the owner of the stock, at the time of the sale; or that the contract was in writing. There is no doubt the statute requires, in order to make the contract valid, that the party contracting to sell shall either have the certificate, or be otherwise entitled to sell the same. (1 R. S. p. 710.) But it never was necessary to aver such possession, in the declaration, before the code; nor do I think it necessary now. The fact on which the plaintiff relies, is the making of the contract. This is admitted by the demurrer. It must be a legal contract or it is nothing, and issue upon the question whether a contract was made or not would involve its legality, and of course would include the requisite facts to make the contract a legal one.

These remarks apply to the objection that the complaint does not allege that the contract was in writing. I adhere to the opinion that it was unnecessary, as was held in *Stern v. Drinker*, (2 E. D. Smith, 401.) The same rule would apply to cases under the statute of frauds. In such cases it is unnecessary to aver it. If any legal contract is made, it must be in writing. If not a legal contract, it is no contract. The evidence to prove the contract need not be set out, but only that a contract was made. The mode of making is matter of evidence.

The plaintiff suggested that this defense would now be unavailing, as the legislature had repealed the stock-jobbing act.

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The statute only applies to contracts thereafter made, which contracts are made valid by the 1st section. Whether the repeal of the statute, by the 2d section, could validate the contract which was otherwise void, may well be doubted. In the case of contracts void for usury, the legislature have forbidden corporations to set up the defense. Although the effect of such prohibition is virtually to render the contract effectual, still it does not go so far as to declare a void contract a valid one; and I should hesitate in giving such a construction to the repealing clause. It is unnecessary, however, here to pass upon that question.

Judgment for the plaintiff, on the demurrer, with leave to the defendant to withdraw demurrer, and answer on the payment of costs.

[NEW YORK SPECIAL TERM, June 14, 1858. *Ingraham*, Justice.]

 THOMAS T. FERRIS vs. FRANCIS FERRIS and others.

Where a mortgage contains a condition that in case of the failure of the mortgagor to pay the interest at the time when the same becomes due, or within a certain number of days thereafter, the principal sum shall become due and payable immediately; and the mortgagor, through his own neglect to pay the interest, suffers the whole mortgage debt to become due according to the terms of the mortgage, the court cannot interfere to relieve him from the payment thereof, or alter the terms of the contract.

A condition of that nature, in a bond and mortgage, is not a forfeiture, or a penalty.

The case of *Broderick v. Smith*, (15 How. Pr. Rep. 434,) explained.

DEMURRER to answer. The action was to foreclose a mortgage. The complaint alleged the execution of a bond, by the defendant Ferris, on the 15th of June, 1857, for the payment to the plaintiff of \$2477.50 on or before the 21st day of June, 1859, with interest payable semi-annually; and that as collateral security for the payment of that amount,

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Ferris on the same day executed a mortgage on certain premises therein described, with the same condition as the bond; and that both the bond and mortgage contained the following additional clause or condition, viz: "that should any default be made in the payment of the said interest, or any part thereof, on any day whereon the same is made payable, as above expressed, and should the same remain unpaid and in arrear for the space of thirty days, that then the said principal sum of \$2477.50, with all arrearages of interest thereon should, at the option of the plaintiff, become due and payable immediately thereafter." The complaint further alleged that the defendants had failed to comply with the condition of the said bond and mortgage, by omitting to pay the interest thereon, for more than thirty days, which became due and payable on the 15th day of December, 1857; and he claimed that by reason of that omission the whole amount secured by the mortgage had become due and payable. The defendants R. Rafael and Margaret M. his wife, were made parties, as having or claiming an interest in the mortgaged premises, Mrs. Rafael having purchased the same of Ferris, subsequent to the execution of the mortgage.

The defendant Margaret M. Rafael put in an answer, alleging that the fee of the mortgaged premises was vested in her as her sole and separate estate; that R. Rafael, her husband, was her business agent, and, as such, had the exclusive management of her affairs; that he had been for several months last past absent from the city of New York, and unexpectedly detained in foreign parts; that she (Mrs. R.) was unacquainted with the forms and usages of business; and that no demand had ever been made upon her, previous to the commencement of this action, for the payment of the interest moneys mentioned in the complaint. That she, the defendant, had for several years resided and still did reside, in the city of New York; that she was now and had been at all times, ready and willing to pay to the plaintiff the said interest moneys, and that she now paid the same, amounting to the sum of \$86.71

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with interest from the time when it became due, amounting to \$1.90, together with the plaintiff's costs and disbursements, &c. And the defendant prayed that she might be relieved, by the order of this court, from the penal clause of the said bond, or special condition in the complaint mentioned, and from the plaintiff's claim thereon, for the payment of the principal sum secured by said bond; and that the complaint might be, as to her, dismissed with costs from the time of filing and serving the answer, and the payment of the moneys into court.

To this answer the plaintiff demurred, on the ground that the matters contained therein were insufficient to constitute a defense. Various specifications of insufficiency were made, which it is not necessary to mention.

Callaghan & Miller, for the plaintiff.

Wm. Henry Anthon, for the defendant.

INGRAHAM, J. In this case the principal sum secured by the mortgage was made payable in 1859, with interest payable semi-annually. The mortgage contained a condition that if the interest should at any time remain unpaid for thirty days after it became due, the principal sum should become due and payable immediately. The plaintiff seeks to foreclose the mortgage, on the ground that the interest has remained due and unpaid for more than thirty days. The answer sets up that Mary Rafael, the present owner of the premises, bought the same as part of her separate estate; that her husband has the management of her affairs; that he has been absent for some months; that she is ignorant of business; and that no demand has been made of such interest. The defendant also states that she has paid into court the interest, and interest thereon, and costs, and she asks that the complaint may be dismissed with costs, from the time of the answer. To this answer the plaintiff demurs.

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Upon the argument of this case I supposed I was concluded by the decision of the general term in *Broderick and others v. Smith*, (15 How. 434;) but on examining that case, I find that the plaintiff was bound to have a judgment which was a lien on the premises removed, which was not done until after the interest became due, and then no notice was given of the removal of the incumbrance. Mr. Justice Clerke, in delivering the opinion of the court, says: "I think it was contrary to all equitable dealing for the plaintiff to take advantage of these circumstances, instead of apprising the defendants of the cancelment (of the judgment.) * * * * This was oppressive and unreasonable conduct, on the part of the plaintiffs."

This can hardly be considered as deciding that in a case free from any trick or oppressive conduct, a plaintiff having a bond and mortgage on which payment of the interest has been neglected for the thirty days, may not collect the principal if the defendant brings the amount of the interest and costs into court.

Without expressing any opinion as to the merits of the case of *Broderick v. Smith*, above cited, I feel at liberty to examine the questions in this case as not affected thereby. The contract made between the parties was for the payment of the principal sum on the 15th of June, 1859, with interest payable half-yearly; and if the interest was not paid within thirty days after it was payable, then the principal sum should be payable immediately thereafter. The question naturally arises, whether this court, without any other cause than an excuse from the defendant for neglecting to comply with the conditions of the contract, can alter the terms of it, without the consent of the parties. That the court may correct errors in a contract, or reform it to make it conformable to the agreement between parties, is undoubted; but no such mistake is alleged here. The contract is as the parties agreed. The plaintiff takes the bond and mortgage, with the agreement of the mortgagor to pay the interest at a fixed time, and to pay

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the principal within thirty days thereafter, if the interest is not paid. What right has any court to say that it is oppressive or unconscionable in a plaintiff to claim the payment of the money which belongs to him on the day when the parties agreed it should be paid? I exclude from the consideration of this question any inquiry as to the power of a court of equity to interfere where fraud has been used to postpone the payment of the interest; because no fraud is alleged here. The only defense is, that the defendant, being unacquainted with business, suffered the day of payment to arrive sooner in consequence of her own negligence, than she would otherwise have done. Is the plaintiff in the wrong, for this neglect? Or has he done any thing by which a court would be authorized to interfere and change the conditions on which he loaned his money and took the bond and mortgage as security?

In *Noyes v. Clark*, (7 Paige, 179,) the chancellor says: "The parties had an unquestionable right to make the extension of credit dependent upon the punctual payment of the interest at the times fixed for the purpose. And if, from the mere negligence of the mortgagor in performing his contract he suffers the whole debt to become due and payable, according to the terms of the mortgage, *no court* will interfere to relieve him from the payment thereof according to the conditions of his own agreement." (*Steel v. Bradfield*, 4 Taunt. 227. 5 Barn. & Adol. 40. *Gerolett v. Hanforth*, 2 Wm. Black. 958. 3 Burrow, 1370.)

It is urged that this is a forfeiture, and that equity will always relieve a party against a forfeiture. The plaintiff's claim is for the money secured by the bond, and interest. There is nothing more claimed. The debtor owes the amount. He forfeits nothing. He is required to pay nothing but his debt. There is no forfeiture to be relieved. If the bond had been conditioned to pay the money in one year, with an agreement to extend the payment a second year, if the interest was paid within thirty days after it became due, no one would for a moment argue that there was any forfeiture. And yet that

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condition, and the condition of the bond in suit are substantially the same.

Nor can it be called a penalty. That is a sum named as damages, to be recovered for violating an agreement or promise, in lieu of damages. There is no such thing here. No damages are called for. Merely altering the day of payment is neither a forfeiture of any property, nor a penalty in damages for the breach of any agreement.

I have been referred, by the defendants, to the case of *Mayo v Judah*, (5 *Munf.* 494,) in which the court held that it was a forfeiture because it imposed further and greater obligation upon the parties. I do not so consider it, in this case; and unless there is something in the act of assembly under which that case arose, allowing it, I must dissent from that conclusion. The same remarks apply to the cases cited from 2 *White & Tudor's Eq. Cas.* p. 468.

In the second and third districts, I am informed, decisions have been made, adverse to the right of the defendant to relief in similar cases to the present.

My opinion is that the plaintiff is entitled to judgment. And a reference is ordered, to compute the amount due on the mortgage.

[NEW YORK SPECIAL TERM, June 21, 1858. *Ingraham*, Justice.]

STEWART, receiver &c., vs. BEEBE and others.

In an action by a receiver, it is not necessary for the plaintiff, in his complaint, to set out all the proceedings by which he was appointed. It is sufficient if he states the mode of his appointment.

Thus where the complaint showed the plaintiff to be receiver of the Bowery Bank, appointed by the supreme court, by an order made on a specified day, on condition of filing security; and that such security was given accordingly; *Held* that enough was stated to enable the defendant to take issue upon the legality of the plaintiff's appointment, if he chose to do so. Demurrer overruled.

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DEMURRER to complaint. The action was brought upon a promissory note, made by one of the defendants, and indorsed by the other, to the Bowery Bank. The complaint alleged "that by an order of the supreme court of the state of New York, made at the City Hall of the city of New York, on the 5th day of November, 1857, the plaintiff was duly appointed receiver of the Bowery Bank, of the city of New York, upon filing certain security therein mentioned; which said security was duly filed on the 6th day of November, 1857; and that the plaintiff thereupon entered upon the duties of his appointment, and is now in the lawful possession of the property and effects of said Bank, as receiver thereof." The complaint then set forth the making and indorsement of the note in suit; and waiver of demand of payment and notice of protest; and admitted the payment of a part of the amount of the note. And the plaintiff alleged that he, as receiver as aforesaid, was the lawful owner and holder of the said note, and that the defendants were indebted to him as such receiver, thereon, in a specified sum, with interest; for which amount the plaintiff demanded judgment.

The defendants, by their demurrer, specified the following grounds of objection to the complaint.

1. That it did not appear by such complaint that the plaintiff had legal capacity to sue.

2. That the complaint did not state facts sufficient to constitute a cause of action. (1.) That it did not appear that the Bowery Bank was a corporation, created under the laws of this or any other state. (2.) That it did not appear that such bank was insolvent; (3.) That it did not appear that said bank was declared to be insolvent, by any court of competent jurisdiction. (4.) That it did not appear that the necessary legal steps were taken to have such bank declared insolvent. (5.) That it did not appear that the necessary legal steps were taken to have a receiver of such bank appointed. (6.) That it did not appear that the plaintiff was legally or properly appointed receiver of such bank. (7.) That

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it did not appear that stockholders owning stock in such bank in the aggregate exceeding one-tenth part of the capital paid in applied to have such bank declared insolvent and a receiver thereof appointed. (8.) That it did not appear that the sureties given by the plaintiff were approved. (9.) That it did not appear where such security was filed. (10.) That in other particulars the complaint did not state facts sufficient to constitute a cause of action.

W. Slosson, for the plaintiff.

Beebe, Dean & Donohue, for the defendants.

INGRAHAM, J. This action is brought by the receiver of the Bowery Bank. The complaint describes the plaintiff as having been duly appointed receiver, by an order of the supreme court, &c. The demurrer states as grounds of demurrer: 1. That the plaintiff has not legal capacity to sue. The objection to the allegation in the complaint respecting the mode of the plaintiff's appointment, is that the appointment must be made by a judge, out of court, and not by the court itself. And sections 236 to 239 of the statute (1 *R. S.* 4th ed. p. 1162,) are referred to as authority therefor.

By the law, as passed originally, (2 *R. S.* p. 464,) it will be seen that the power of appointing receivers was vested in the court of chancery, and not in the chancellor. The subsequent transfer of power from that court, under the new constitution, was to the supreme court, and not to a justice of that court. By the statute of 1848 (*Laws of 1848*, ch. 226,) provision is made for the proceedings under which the receiver, here, was appointed; and that statute authorizes the application to be made to a justice of the supreme court. In some places it is said to be made to a justice of the court for the proper order; in other sections of the act, the order is to be made by a justice, at any special term. The 25th section recognizes the right of appeal from any such order, and I see nothing to prevent the order from being entered by the justice

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making it, at any term of the court, in the same manner as other orders.

2d. It is also averred as a ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action; because it does not state the facts necessary to show that the order appointing a receiver were such as were required by statute.

It never was necessary to set out all the proceedings by which a receiver was appointed. On the contrary, it was sufficient to aver that he was appointed receiver; the court by which the appointment was made, and the date of the order. Even this was not necessary where the action was on a note held by a banking institution, or was brought for property of an insolvent debtor; because in such a case the receiver was authorized to sue in his own name or otherwise. (*Gillet v. Fairchild*, 4 *Denio*, 82. *Haxtun v. Bishop*, 3 *Wend.* 16.)

Since the code, it has been held that a plaintiff suing as a receiver must allege his authority, in the complaint. (*Bangs v. McIntosh*, 23 *Barb.* 591.) In *White v. Joy* the court say "the receiver must set out the proceeding, so that the court may see that the appointment was legal. In such a case the appointment of the receiver is a part of the plaintiff's title. It is like the granting of letters testamentary or of administration. Unless the fact is stated, the plaintiff does not show any right to sue." Mr. Justice Marvin also says, "If the plaintiff claimed in his character of receiver he should have inserted the proper averments in the body of his complaint, to show his right to maintain his suit in that character, and his title to the note." These decisions all refer to the mode of pleading, as in the case of administrators or executors, and to the case of *Beach v. King*, (17 *Wend.* 197,) as authority. In that case Justice Bronson has pointed out what is necessary. He says: "The proper mode of pleading is by a direct allegation that such letters were granted. * * * He should have stated how he was appointed, and then the court could determine its sufficiency, upon demurrer."

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In these decisions, no reference appears to be made to the section of the revised statutes allowing receivers to sue in their own names; or to the subsequent statute, passed in 1845, (*Laws of 1845, ch. 112,*) which provides expressly that such receivers may sue in their own names for any debt, claim or demand transferred to them, or to the possession of which they are entitled.

I do not understand these decisions as requiring a receiver to set out all the proceedings by which he was appointed, but merely that he show the mode of his appointment. I consider this sufficiently done in the present case. The complaint shows the plaintiff to be receiver of the Bowery Bank, appointed by the supreme court, by an order made on a day named, upon filing security; and that such security had been filed. Enough is stated to enable the defendant to take issue upon the legality of the appointment, if he pleases.

Judgment for the plaintiff on demurrer, with leave to the defendant to withdraw his demurrer, and answer on payment of costs.

[NEW YORK SPECIAL TERM, June 21, 1858. *Ingraham*, Justice.]

EDWIN PARKER, president of the Meriden Machine Company,
vs. SCHENCK & RUTHERFORD.

The statute of frauds does not apply to a contract to make and deliver an article not then in existence, out of materials to be furnished by the manufacturer, where the article is to be constructed in a special manner, and of specified materials, and the price depends upon the quantity of materials used.

THIS action was brought to recover the sum of \$313.75, the price agreed to be paid by the defendants for a double acting pump, of Farnham's patent, to be made by the plaintiffs, for the defendants. The complaint alleged the making of the contract—which was not in writing—between the agent

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of the defendants and the plaintiffs; the manufacture of the pump agreeably to the terms of the contract, and the tender thereof to the defendants, and their refusal to accept or pay for the same. By their answer, the defendants denied the making of the contract sued on, and alleged that the only contract made by them, with the plaintiffs, was for a double action six inch chamber and sixteen inch stroke brass pump, the price of which was by the terms of the contract in no event to exceed the sum of \$208; that for the only pump which the plaintiffs presented or offered to the defendants they charged the sum of \$313.75, which sum the defendants had never agreed to pay to the plaintiffs, for any pump whatever. On the trial the plaintiffs proved the making of a verbal contract of the tenor and effect set forth in the complaint, and the manufacturing of the pump, according to the terms thereof; the weight of the pump; and the tender thereof to the defendants; and their refusal to accept. When the plaintiffs rested, the defendants' counsel moved for a dismissal of the complaint, on the ground that no sufficient contract had been established, within the provisions of the statute of frauds. The justice holding the circuit decided that no sufficient contract had been proved, within the statute, and ordered the complaint to be dismissed. The plaintiffs excepted, and moved for a new trial.

A. M. Sniffen, for the plaintiffs.

B. D. Silliman, for the defendants.

INGRAHAM, J. The facts proven in this case were, that the defendants wanted a pump; and on examining those in possession of the plaintiffs the defendants were not satisfied with them. They wanted one made of brass, with some alterations varying it from those of the plaintiffs. They inquired as to the cost, and were informed of a gross sum as the cost of a part of the pump, and that the brass would be charged for by the pound, over and above the cost if made of iron. An order

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was finally given, to have the pump made. The defense is, the want of a written contract, under the statute of frauds.

The present contract is not within the class of cases to which that statute relates. It was not for the mere sale of a pump, but for the manufacture of a pump in a peculiar way, suited to the purposes of the defendants, and which might not have been required for another. It comes within that class of cases referred to by Judge Bronson in *Downs v. Ross*. (23 *Wend.* 273,) as cases out of the statute. "With a single exception they relate to contracts for the sale of a thing not then in existence, but which was to be constructed or manufactured by the vendor."

There can be no doubt in this case, that there was to be a special mode of constructing this pump for the defendants, and that work was to be done, of a particular character. Nor was the price fixed, for it. A portion was to be charged at a fixed rate; the balance depended on the quantity of brass used. It is the same as if a man bought cloth and ordered it made into a coat; when the price to be charged for the making was a fixed sum, and the amount to be charged for the cloth depended on the quantity used. Such an order has always been considered as not within the statute.

In all the cases cited by the defendants' counsel the contract was for specific articles, at a fixed price; and the contract did not contemplate any work to be done, in preparing the article, in compliance with directions previously given, but merely preparing for market, or sale, the article purchased.

In this case, as in the cases in 18 *John.* 58, and 8 *Cowen*, 215, the article agreed for was to be manufactured according to particular directions. Chitty lays down the rule applicable to such cases to be, that the statute does not apply to contracts for work, labor and materials; that is, a contract to make, complete and deliver *in futuro*, goods not in existence and consequently not capable of delivery or part acceptance, at the time of the bargain. (*Chit. on Cont.* 306.) To avoid this rule in England another statute was enacted, bringing that class,

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also, within the statute. But no such alteration of the law has been made in this state, and until so altered, I suppose the rule to remain.

I think the justice erred, upon the trial, in dismissing the complaint for this cause.

A new trial ordered ; costs to abide the event.

[NEW YORK SPECIAL TERM, July 3, 1858. *Ingraham*, Justice.]

LORENZO D. DICKENS, adm'r of Sally Dickens his wife, *vs.*
THE NEW YORK CENTRAL RAIL ROAD COMPANY.

An action can be maintained, under the act of 1847, " requiring compensation for causing death by wrongful act, neglect or default," by an individual as administrator of his deceased wife, whose death was caused by the negligence of the defendant ; although the deceased left no father or mother or descendants surviving her.

An action can be maintained by the personal representative of a deceased person, whose death has been wrongfully caused by the defendant ; although the deceased left no husband or wife or next of kin surviving, who could ever have any legal claim upon such person, if living, for services or support.
Per BALCOM, J.

The language of section 2 of the act of 1847, declaring that the jury "*may* give such damages as they shall deem a fair and just compensation," &c. " with reference to the *pecuniary* injury resulting from such death, to the wife and next of kin of such deceased person," is merely permissive ; and cannot be regarded as restricting the jury, on the question of damages, to the *pecuniary* injury resulting from the death of the person killed, to the wife and next of kin of the deceased.

MOTION by the defendant for a new trial. The facts in the case sufficiently appear in the following opinion of Justice BALCOM.

T. Jenkins, for the plaintiff.

M. S. Miller, for the defendant.

BALCOM, J. Sally Dickens was the wife of the plaintiff, and was killed by reason of the negligence of the defendant's

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agents, on the defendant's rail road, at Canastota station in the county of Madison, in August, 1854. The plaintiff, as her administrator, obtained a verdict against the defendant, at the Madison circuit, in March, 1857, for \$1500, for injuring her and causing her death. The action was brought under and pursuant to chapter 450 of the Laws of 1847, entitled "An act requiring compensation for causing death by wrongful act, neglect or default," as amended by chapter 256 of the Laws of 1849.

The defendant's counsel has moved for a new trial, on several grounds; but the only one which I think of sufficient importance to call for examination is, whether the plaintiff can maintain the action, inasmuch as the deceased left no father or mother, child, or descendant of a child surviving her.

If the plaintiff's wife had not died, the defendant would have been liable to respond in damages, for injuring her. (*Thomas v. Winchester*, 2 *Selden*, 407;) and if section one of the act of 1847, (*Laws of 1847*, p. 575,) stood alone, there could be no doubt of the defendant's liability in an action for damages in respect to the injury to her, notwithstanding her death. In *Quin v. Moore*, (1 *E. P. Smith*, 434,) Comstock, J., said: "The only condition on which the right of the administrator to sue under the statute depends, is the common law right of the injured person to maintain an action if he were living." This language is certainly comprehensive enough to authorize this action; but it is contended by the defendant's counsel, inasmuch as there was a mother, who survived her minor child that was killed, in the case of *Quin v. Moore*, and also in the one cited to sustain the decision in that case, that the language used by Judge Comstock should not control the decision of the case at bar. Now conceding the question in this case to be undecided, I am of the opinion this action is well brought; and that such an action can be maintained by the personal representative of a deceased person, whose death has been wrongfully caused by the defendant; although such deceased person left no husband or wife, or next of kin surviving, who

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could ever have any legal claim upon such person if living, for services or support. It has not been denied that the language of the first section of the law under which this action was brought is broad enough to sustain this conclusion; and thus much may be regarded as conceded. But it is insisted that notwithstanding the broad and comprehensive language employed in the first section of that law, the right to maintain actions under it is restricted to cases where the deceased person leaves a widow or next of kin surviving, who sustains, or may sustain some pecuniary loss by reason of the death of such person. When it is asserted that section two declares "the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person," it must be remembered that there may be next of kin to the deceased person who could have no legal claim upon such person, if living, for services or support. The other part of section two, on which more stress is laid by the defendant's counsel, is, that "in every such action the jury *may* give such damages as they shall deem a fair and just compensation, not exceeding five thousand dollars, with reference to the *pecuniary* injury resulting from such death, to the wife and next of kin of such deceased person." (*See Laws of 1849, p. 388, § 1.*) I think this language is merely permissive, when construed with section one, and that it cannot be regarded as restricting the jury, on the question of damages, to the *pecuniary* injury resulting from the death of the person killed, to the wife and next of kin of such deceased person. The legislature has said the administrator *may* recover such damages, but it has not declared he shall recover no other damages, as I think it would have done, if it had been the intention of the legislature to limit the right of action to cases where the deceased person leaves a wife or next of kin, who could have a *legal* claim for services or support upon such deceased person if living.

I am of the opinion the defendant's motion for a new trial should be denied, with costs.

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Justices GRAY, MASON and CAMPBELL concurred in the above conclusion, upon the ground that they thought the decision in *Quin v. Moore* was decisive of the question whether the plaintiff as administrator of his wife could sustain this action.

Motion for a new trial denied, with costs.(a)

[DELAWARE GENERAL TERM, July 6, 1858. *Gray, Mason, Balcom and Campbell*, Justices.]

(a) In *Keller, adm'r &c., v. The New York Central Rail Road Company*, decided at the same term, a similar decision was made. That was an action growing out of the same occurrence which was the foundation of the above action. It was brought by the plaintiff, B. Keller, as administrator of Rachel Keller, his mother, to recover damages arising from injuries sustained by her on that occasion, by which she was killed. The intestate was a widow, and had no child at the time of her death, under the age of 21 years, or relative who was dependent upon her. The plaintiff obtained a verdict, for \$1700, and the defendant moved for a new trial, on the ground that the intestate left no husband or next of kin who sustained any pecuniary loss by reason of her death. The court denied the motion for a new trial, for the same reasons assigned in the above case. (Opinion by BALCOM, J.)

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LOUNSBURY vs. DEPEW.

Where a promissory note was shown to have been in the possession of, and owned by, the payee within four or five days of his death, and there was no evidence of any transfer thereof by him, in his lifetime, but about two weeks after his death his widow was in possession of it, claiming it as her own, and she subsequently negotiated it to the plaintiff; and it appeared that the payee died intestate and indebted, and no letters of administration had been issued: *Held* that it was to be inferred, from these circumstances, that the note belonged to the payee, at the time of his death, and that his widow not being his legal representative, nor the owner of the note, had no right to transfer the same to the plaintiff. WRIGHT, P. J., dissented.

Held also, that the defendant was not *estopped* from setting up a want of title in the plaintiff, by the fact of his having made payments upon the note, while it was held by the widow, and to the plaintiff after it came into his hands, some of which payments were indorsed upon the note by the defendant in his own handwriting. WRIGHT, P. J., dissented.

Estoppels, as they operate to exclude the truth, must be strictly construed.

Per HOGEBOM, J.

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THIS is an appeal by the defendant from a judgment rendered in favor of the plaintiff on the 1st day of July, 1856, upon the report of a referee. The plaintiff's claim was for a sum of \$34.93, found due from the defendant to him on settlement, on the 16th of March, 1855, and also for the amount of a promissory note executed by the defendant, dated the 18th of March, 1855, and payable to James Carroll or bearer, one day from date, with interest. Judgment was rendered in favor of the plaintiff for both of these amounts, with costs. James Carroll, the payee and original holder of the note, died in the latter part of March, 1855. By the report of the referee it appears that the note was *at one time* his property. The referee gives no specific date. By the evidence of William T. Hornbeck it appears that the witness knew of Carroll's holding this note, about six weeks before his death, and by the evidence of John Hornbeck it appears that Carroll had the note three weeks before his death; indeed, within two weeks of his death, for the same witness swears that Carroll was sick for two weeks and that during his sickness the witness, at his request, took the note and collected some money on it from the defendant, which is indorsed on the note. There are only two indorsements on the note in March, 1855, to wit: the 26th and 27th of March, and as Carroll died in the latter part of March, the payments must have been made at farthest within four or five days of his death. There is no evidence of the transfer of the note by Carroll. His widow, Mary Ann Carroll, is shown to have been in possession of it about two weeks after his death. She was sworn in the case and testified that she negotiated it to the plaintiff and got the amount of it in trade at his store in June, 1855, in family necessities; that she expected the plaintiff knew how she came by the note, but did not recollect that she told him she got it from her husband; that it was generally understood in the neighborhood how she got the note. She subsequently says, that she told him she had a note which Carroll had *given* to her as hers. It does

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not appear *when* this alleged gift was made. William T. Hornbeck testifies that on the occasion when Carroll spoke to him about the note, he also said that he had told his wife to put the note in the trunk "and then I will know where to find it, or if you should want it." Carroll owed debts when he died, which are still unpaid, and left him surviving a wife and two children. Carroll left no will, and no letters testamentary or of administration were taken out upon his estate. The defendant made repeated payments upon the note, to the widow or her agent, after her husband's death, which were indorsed upon the note in the defendant's handwriting, which handwriting was known to the plaintiff. The defendant also made two or more payments upon the note to the plaintiff himself. The creditors of Carroll forbade him to pay on the note. The parties all resided in the same village or neighborhood, and were well acquainted with each other. The widow, before transferring the note to the plaintiff, applied to the defendant for a payment upon it, which he did not make, and she then informed him she should sell the note, and he said "sell on." Upon these facts the referee reported in favor of the plaintiff for the amount of both the account and note, and the defendant duly excepted.

C. B. Cochran, for the defendant.

E. Cooke, for the plaintiff.

HOGEBROOM, J. The report of the referee leaves it uncertain what was the latest date at which Carroll was in possession of the note, but it is apparent from the testimony that it must have been within a few days of his death. No transfer of the note by him is shown. The evidence fails to show satisfactorily even an attempted gift; although the widow *stated* to the plaintiff that her husband had given her the note. But the *fact* of the gift is not expressly sworn to; the *manner* of it is not shown; nor does it appear that any *delivery* ever

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accompanied the donation. Nor could the husband, under the circumstances, make a valid gift of the note. He was *indebted* at the time, and his creditors had a right to his property, and notified the defendant not to pay to the widow. I think we must infer that the note belonged to James Carroll, at the time of his death. If so, the plaintiff does not make title to it. He received it from the widow, and she had no right to transfer it. It could only be done by the *legal representative* of Carroll, and none such was ever appointed. (*Edwards v. Campbell*, 23 Barb. 423. *Woodin v. Bagley*, 13 Wend. 453. *Beecher v. Crouse*, 19 *id.* 306. *Jenkins v. Freyer*, 4 Paige, 47.) An administrator may yet be appointed, and in that case the defendant would have no legal defense to an action brought by him upon this note. The defendant is not *estopped* by his payments to Mrs. Carroll and to the plaintiff. They are proper evidence for a jury to consider, but are not in their nature or effect conclusive. So far as the plaintiff is concerned, the case lacks one of the most material ingredients of an estoppel, to wit: that the defendant by his declarations or conduct induced the plaintiff to become the purchaser of the note. It is a fallacy to suppose that this inducement took place by the defendant having indorsed on the note in his own handwriting some of his payments, which handwriting was known to and inspected by the plaintiff before he purchased the paper. This does not amount to a representation by the defendant *to the plaintiff*, on the faith of which he has a right to act. The representation, if it be one, was not made *at the time*, nor to the plaintiff, nor in his presence or hearing; nor for the purpose of inducing action on the part of the plaintiff; nor upon an occasion when the defendant spoke or was called upon to speak. (*See Reynolds v. Lounsbury*, 6 Hill, 534; *Martin v. Angell*, 7 Barb. 407; *Pennell v. Hinman*, *Id.* 644.) Estoppels, as they operate to exclude the truth, must be strictly construed. If the defendant had stood by, at the time of the transfer of the note to the plaintiff by the widow, and the latter had then represented the

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note as owing to her by the defendant, and he had not denied it, or had acquiesced in it, and the plaintiff had taken the note upon such representation, that would have constituted an estoppel. But the defendant was *not present*: he was ignorant of the representations made by Mrs. Carroll, and in no way contributed to induce the plaintiff to give confidence to them. All that he did was, on a previous occasion, to make payments upon the note, to the widow. Perhaps, at the time he did so, he was ignorant of the facts; perhaps he was himself induced by false representations to suppose that she was the bona fide holder and owner of the note; perhaps he did it under the expectation and promise by her that she would take out letters upon the estate and credit him with the payment in the capacity of administratrix. We can imagine a variety of reasons which might have operated upon him to induce him to make the payment, quite consistent with the absence of any legal obligation to do so, when the facts became fully known.

Nor are the payments to the plaintiff himself an estoppel upon the defendant. They are strong evidence of a supposed legal liability, but not a conclusive bar. He may have been ignorant of the facts; he may not have had time to inquire; and the amount of the payment may have been so small as to be a matter of indifference whether it was legally collectable or not. There is no just reason for compelling a party to pay the residue of an unjust demand, simply because he has paid a portion of it without objection. The whole doctrine of estoppel rests upon this foundation, that a party has refused to speak when he ought to have done so, and has omitted to make known important facts, the knowledge of which would have induced a different course of action, from what would have taken place if all the facts had been disclosed. Although the doctrine of estoppel is not always carefully expressed, the cases all go upon the assumption that the party estopped is guilty of a false statement, or of a concealment of material facts, at a time when he has an opportunity and is

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called upon to speak, which representation or concealment has had a material influence upon the conduct of a third party who would now suffer injury without fault on his part, if the real truth were disclosed and allowed to have its legitimate effect. (*Welland Canal Company v. Hathaway*, 8 *Wend.* 480. *Dezell v. Odell*, 3 *Hill*, 215. *Lowry v. Tew*, 3 *Barb. Ch.* 407. *Outwater v. Dodge*, 6 *Wend.* 397. *Tylee v. Yates*, 3 *Barb.* 222. *Petrie v. Feeter*, 21 *Wend.* 172. *Truscott v. Davis*, 4 *Barb.* 495. *Lewis v. Woodworth*, 2 *Comst.* 512. *L'Amoureux v. Vischer*, *Id.* 281.)

The judgment should be reversed and a new trial granted, with costs to abide the event.

GOULD, J., concurred.

WRIGHT, P. J. dissented.

Judgment reversed.

[ALBANY GENERAL TERM, September 6, 1858. *Wright, Gould and Hogeboom*, Justices.]

 KING vs. KIRBY.

A cause of action, originally within the exceptions of the act of 1831 to abolish imprisonment for debt, does not lose that character by being assigned to a third person.

The remedies provided by that act were intended to aid the enforcement of the claim, in whose hands it might be; provided the relation of the parties remained the same, and the cause of action had not been substantially changed.

Accordingly held that the assignee of a judgment recovered against a debtor for fraud and false and fraudulent representations, could institute proceedings under the act of 1831, for the arrest and imprisonment of the judgment debtor; especially where it appeared that some of the acts of fraud were committed after the assignment of the judgment.

THIS is a common law certiorari directed to his Honor Justice Gould, to review certain proceedings had before him under the non-imprisonment act of 1831, which resulted in the dis-

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charge by him of the defendant Jacob B. Kirby from imprisonment, "on the ground that the proceedings could not be prosecuted by Harvey J. King as the assignee of the judgment." The papers disclose a case of fraud, which, independent of the question upon which the judge based the discharge, would have authorized the arrest and imprisonment of the debtor under the provisions of the non-imprisonment act of 1831. (*Laws of 1831, ch. 300.*) By the plaintiff's affidavits it appeared that Kirby procured the acceptances of Norman Stratton to the amount of \$10,900, under false and fraudulent representations as to the amount of his property, and fraudulently disposed of a portion of his property. Stratton having recovered judgment for his demand to the amount of \$9364.54, on the 1st day of July, 1854, made a general assignment of his property, including this judgment, to the plaintiff, for the benefit of his creditors, on the 27th day of February, 1856. Some of the allegations of fraud, intended to show a fraudulent and clandestine removal by Kirby of a portion of his personal property out of the state with intent to defraud his creditors, charged the last mentioned act as having occurred in the month of September, 1856, six months or more after the assignment to the plaintiff. The defendant interposed before the judge an affidavit denying the fraud charged in the plaintiff's papers. The merits of the case on the question of fraud were not disposed of by the judge, but on the 30th day of April, 1858, he dismissed the proceedings and discharged the prisoner, on the ground that the proceedings could not be prosecuted by the assignee of the judgment. The plaintiff obtained from this court a common law certiorari, upon the return to which the foregoing facts appeared, and the question was thus presented for review.

W. Barnes and H. G. Wheaton, for the plaintiff.

W. A. Beach, for the defendant.

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By the Court, HOGEBOM, J. Prior to the act of 1831, imprisonment was one of the remedies authorized by law to enforce the collection of debts. By that law this remedy was abolished, except in certain cases. The excepted cases were in general where there was an intended fraudulent removal, or a fraudulent concealment, or a fraudulent assignment or disposition of property ; or a fraudulent refusal to apply it to the payment of a debt ; or a fraudulent contracting of the debt or incurring of the obligation respecting which the suit was brought. It cannot be denied that the plaintiff's debt, as to the subject matter thereof, originally came within one or more of these exceptions, and the only question is whether it lost that character by being assigned to the present owner. I am clearly of opinion that it did not. The remedies provided by the law of 1831 were, I think, intended to aid the enforcement of the claim, in whose hands soever it was. Before the passage of the non-imprisonment act, the owner of the demand, whether the original creditor or his assignee, could imprison the debtor. That act limited the remedy to particular cases, mostly those tainted by fraud. And it made no distinction, any where, in regard to the person who owned the demand. No doubt it must be a demand of the description specified in the act, and if by assignment it can be shown to have lost its distinctive character, the remedies under that act are inapplicable. For example, the law authorized imprisonment in actions upon contract for moneys received in a fiduciary capacity. This was a peculiar relation, implying personal trust and confidence. It attached to the debt a kind of sacredness or solemnity of obligation which did not belong to debts of an ordinary character. If the nature of the debt or of the relation was changed by the consent of the parties, then the remedy was changed also. If the creditor and the debtor, standing in such relation to each other, had a general statement or settlement of accounts, and a general balance was struck for which the debtor gave his note or his bond, or his paper secured by a third person, I think then it would be placed upon the footing of an

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ordinary debt—the relation of the parties would be materially changed, and the right of imprisonment gone. A suit brought upon such a demand would not, in a proper sense, be an action upon contract for moneys received in a fiduciary capacity. It would embrace demands for which imprisonment was not allowed; the plaintiff would rely for his recovery upon the account stated, or on the new security guarantied by a third person. The cause of action would be materially different from what it originally was.

But I am not able to see that any such consequence legitimately follows from the mere assignment of a demand, otherwise within the protection of the act of 1831. The debt retains its original character. It has around it still all those fraudulent attributes, as regards the debtor, which it originally possessed. It is not blended with any other claim. The parties have not in any way agreed to place it on a different footing. It is precisely in its original position, except that through the act of the original creditor it now belongs to a third person. I do not think this should affect the remedy. I cannot think the legislature ever contemplated any such result. Before the act the remedy would have existed in favor of the assignee, and the act itself makes no limitation of the remedy to the original creditor. It has been the practice, I think, to construe the benefit of the provisions as attaching as well to the substituted as the original creditor. An eminent commentator gives it this construction.

The act gives the remedy to the *plaintiff*. The provisions of the act must receive a liberal and benign construction to favor the evident intent of the legislature. This was to give or retain certain remedies for the collection of debts. The remedy attaches to, and follows, the debt. It is one of the means of its enforcement. Why should there be a departure from the ordinary rule? A party is entitled by law to an execution upon his judgment. He is no less so, though he may not be the original creditor. Before 1831 in all cases, and after 1831 in certain cases, he was entitled to an execution

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against the body, upon his judgment—and I think no less so in the case of the assignee, than the primary owner of the demand. The reason is, that imprisonment is a mode of collecting the debt, and the policy of the law is to favor the collection of debts. It is no respecter of persons, and regards the assignee of a demand, provided he be in fact the owner, with the same favor as the original contractor. Were this not so, then any assignment of a demand, voluntary or involuntary, by operation of law or the act of the party, would defeat the remedy by imprisonment. Accident—bankruptcy—death—*any* event which put the assets of the original owner into the hands of his creditors or other persons, would liberate the debtor. I cannot believe such to have been the policy or intent of the law. I think the legal remedies are designed to be preserved in all cases where the relation of the parties remains the same, and the cause of action has not been substantially changed.

In this particular case, also, some of the acts of fraud were committed after the present plaintiff acquired the ownership of the demand. This circumstance must have escaped the attention of the learned judge. I am of opinion that the order should be reversed, and the debtor held liable to arrest and imprisonment.

[ALBANY GENERAL TERM, September 6, 1858. *Wright, Gould and Hogaboom*, Justices.]

MYER *vs.* CRISPELL and others.NEWKIRK *vs.* CRISPELL and others.

Although the law does not imperatively require that a school district meeting shall be held within the bounds of the district, it is eminently fitting that it should be so held.

Where defendants justified the taking of property on a tax warrant issued by them as trustees of a school district, and it was objected that they were not legally trustees, because chosen at a meeting of the inhabitants of the district, held outside of the district; there being no evidence of abuse, nor that the place of meeting was an inconvenient or inaccessible place; nor that any objection was taken, at the time, on that account; nor that the inhabitants were not fully notified and represented at the meeting; nor that any action was ever had to oust the trustees on that account; but on the contrary, it appeared that they subsequently acted, without objection, as trustees, and sufficiently so to constitute them officers *de facto*; *it was held* the objection was unavailable.

Where a tax was voted at a school meeting held in the district, adjourned from a previous meeting held outside of the district, it not appearing that at the original meeting any inhabitant was not notified, or complained, then or afterwards, of the irregularity; or that there was any inhabitant absent from the adjourned meeting; and the evidence showing that it was a meeting of the freeholders and inhabitants of the district; and there being no proof of any objection or complaint of the irregularity of the proceedings having been made, at the second meeting; *it was held* that the court might presume a waiver of the irregularity, if it were such, and a unanimous assent to the regularity of the adjourned meeting.

Where a school district voted "to raise by tax on the district a sum which, together with the amount that should arise from the sale of a school house in district No. 4, should amount to the sum of \$315," under which resolution the trustees raised by tax the whole sum of \$315, not having sold the school house, in consequence of a doubt of their right to do so; *Held* that the fair construction of the resolution was, that in the contingency of nothing being realized from the sale of the school house, the trustees were authorized to raise the entire amount of \$315, by tax; and that the amount to be raised was sufficiently *definite* to satisfy the law.

Where M. was an actual resident of school district No. 4 and his homestead farm lay in that district, but he improved and occupied a lot of 37 acres lying in district No. 6, which lot was not a part of his farm, nor attached to it, nor adjoining it, *Held* that M. was a taxable inhabitant of district No. 6, and that the 37 acres were properly taxed for school purposes, in that district.

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THESE are appeals by the plaintiffs from judgments of the county court of Ulster county, reversing judgments rendered for the plaintiffs respectively, before a justice of the peace. The suits were brought to recover the value of wagons sold by order of the defendants as trustees of school district No. 6, in the town of Hurley, for the non-payment of a tax imposed for the erection of a new school house. The plaintiffs succeeded before the justice, on account of alleged defects and errors in the proceedings which led to the imposition of the tax. The facts, so far as they are important to an understanding of the questions presented, are sufficiently detailed in the opinion of the court.

T. R. Westbrook, for the plaintiff.

C. B. Cochrane, for the defendant.

By the Court, HOGEBOM, J. The plaintiff assails the validity of the defendant's proceedings on two grounds: 1. That the defendants were not trustees. 2. That the tax was unlawfully laid, and principally for the reason that a larger tax was collected than was authorized by a vote of the district. In Myer's case a third ground is added, that the land on account of which the tax was imposed, was not taxable in the district in which the school house was situated.

1. It is claimed that the defendants were not legally trustees, because chosen at a meeting of the inhabitants of the district, held outside of the district, and in district No. 4. The law does not imperatively require the meeting to be held within the bounds of the district, although it is eminently fitting that it should be so. There is no evidence of abuse, nor that it was an inconvenient or inaccessible place; nor that any objection was taken, at the time, on this account; nor that the inhabitants were not fully notified and represented at that meeting; nor that any action was ever had to oust the trustees on that account. On the contrary it appears that

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they subsequently acted without objection as trustees, and I think sufficiently so to constitute them officers *de facto*. If so, the objection is unavailable. (*Stevens v. Newcomb*, 4 *Denio*, 438. *Reynolds v. Moore*, 9 *Wend.* 35.)

2. It is alleged that the tax was illegally imposed. 1st. Because voted at a meeting held in the district, adjourned from a previous meeting, (the same at which the trustees were appointed,) held outside of the district and in district No 4. As before stated, it does not appear that at the original meeting any single inhabitant was not notified, or complained, then or afterwards, of the irregularity; or that there was any absentee from the adjourned meeting held within the bounds of the district; and by the evidence it appears to have been a meeting of the freeholders and inhabitants of the district. Further, there is no evidence of any objection or complaint of the irregularity of the proceedings at the second meeting, and we may therefore presume a waiver of the irregularity (if it be one) and a unanimous assent to the regularity of the adjourned meeting. I think the objection should be treated as untenable. 2d. And principally, it is alleged that the tax was illegally imposed, because the vote of the inhabitants was "to raise by tax on the district a sum which together with the amount that shall arise from the sale of a school house in district No. 4, shall amount to the sum of \$315;" whereas the sum actually raised by tax under the direction of the trustees was (without reference to the sale or value of the school house in district No. 4,) \$315. The answer made to this on the part of the defendants is, that the school house in No. 4 was never in fact sold; that it was illegal to sell it, (1 *R. S.* 4th *ed.* 892, § 87,) and that the meeting in fact meant to authorize and did authorize the raising of the entire amount of \$315 if no available means were realized from the sale of the school house in No. 4.

Section 2 of chap. 382 of the Laws of 1849, (1 *R. S.* 4th *ed.* 892, *sec.* 87) provides for only two cases: 1st. For that of two or more districts *consolidated* into one; and 2d. For

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that where a district is *annulled*. The present case is not embraced within either of those classes. It is the case of a *new* district, formed from parts of two others—the old districts still remaining and requiring of course for their use the school houses already built in them respectively. We have not been referred to any other provision of the school law meeting the case; and if there is none, I do not see that there was any power to make sale of the school house in No. 4. At any rate, either because doubt existed as to the power, or for some other reason, nothing was realized from that source. No amount, in the language of the resolution of the district meeting, did “arise from the sale of a school house in district No. 4.” I think therefore the fair construction of the resolution, in that contingency, is, that the trustees were authorized to raise the entire amount of three hundred and fifteen dollars by tax, and the amount to be raised was sufficiently *definite* to satisfy the law. A similar construction of the law has been given in several adjudicated cases nearly parallel to this. (*Trumbull v. White*, 5 *Hill*, 46. *Ackerman v. Vail*, 4 *Denio*, 298. See also *Williams v. Larkin*, 3 *Denio*, 115.) I lay no stress, in determining this question, upon a remark made at the meeting in response to an inquiry upon that subject, that if the school house in No. 4 could not be sold, the entire amount would be raised by tax upon the district. However much we may be convinced by such a circumstance that the meeting comprehended the practical effect of the resolution, we must nevertheless interpret it by its own terms.

3. The remaining objection applies only to the case of Myer. It is that the 37 acres for which he was taxed, though situated within the bounds of No. 6, formed part of his farm, the dwelling house upon which and in which he resided, being situated within and taxable in district No. 4.

The lot in question was occupied, improved and cultivated by the plaintiff in connection with his homestead farm in No. 6, but did not adjoin any part of said farm, nor was it directly opposite thereto, but was on the opposite side of the Esopus creek,

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and at its nearest approach to said farm was about 80 yards distant from a point directly opposite to the nearest point or corner thereof on the other side of the creek. It had no house upon the same, and had of course no actual resident thereon. Sec. 87 of chap. 480 of the laws of 1847 (1 *R. S.* 4th ed. p. 899,) provides that every person owning or holding real property in any school district who shall improve and occupy the same by his *agent or servant* shall be considered a taxable inhabitant of such district, in respect to the liability of such property to taxation, in the same manner as if he resided therein. Section 89 provides for the taxation of real estate as non-resident lands, where it is not occupied and improved by the *owner, his servant or agent*, and shall not be possessed by any tenant. Sec. 85 directs the trustees to apportion the tax upon all the taxable inhabitants, and upon all real estate lying within the boundaries of such district, the owners of which shall be non-residents. I am of opinion that the plaintiff Meyer was a taxable inhabitant of district No. 6, within the meaning of the foregoing sections. He was, it is true, an actual resident of No. 4, and his farm lay in that district; but he improved and occupied land (this lot) in district No. 6; not literally, so far as the case shows, *by his agent or servant*, but in the same way in substance and effect. I think the word "owner" was inadvertently left out of section 87. It is contained in section 89, and if the plaintiff is not taxable in district No. 6 for this land, I think he is not taxable at all. He is not taxable in district No. 4, because the 37 acres are not, correctly speaking, a part of his farm—not attached to it, nor adjoining it; nor are the two cut or *intersected* by the boundaries of the district. (1 *R. S.* 476, §§ 76, 82.) If land situated like this, improved or occupied by a servant or agent, would make the owner a taxable inhabitant for the purposes of the law, *a fortiori* would it seem to do so, if occupied or improved by the owner himself. Regarding the case as substantially within section 87, if not literally so, I think the 37

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acres were properly taxed for school purposes in district No. 6, and therefore that this objection also fails.

If it were a case of doubt, I do not know but we ought to solve the doubt in favor of public officers who perform an important public service at a trivial rate of compensation, wholly disproportioned to the risk and labor incurred.

The judgment of the county court should be affirmed.

[ALBANY GENERAL TERM, September 6, 1858. *Wright, Gould and Hogeboom, Justices.*]

KENNEDY vs. COTTON.

In an action brought by a corporation, or its assignee, upon an agreement, no specific allegation, in the complaint, of the incorporation of the company, is necessary.

A statement of the name of the corporation, and of the making of the agreement between the defendant and the company, and of what the company did in fulfilment of the agreement, includes the idea of the legal existence of the company; and the fact of incorporation is mere evidence in support of it, not essential to be particularly stated, in the pleading.

The common law rule, on this subject, is wholly unaffected by the provisions of the revised statutes giving a short form of pleading their incorporation by corporations created by statute, and relieving such corporations from proving, in actions brought by them, their corporate existence, "unless the defendant shall have pleaded in abatement or bar that the plaintiffs are not a corporation."

This rule of the common law is too well sustained by authority, to be shaken by the cases of *Johnson v. Kemp*, (11 How. Pr. Rep. 186,) and *The Bank of Havana v. Wickham*, (16 id. 97,) which, upon that point, did not receive due consideration.

A defendant cannot object that the incorporation of a company was not proved, where it does not appear that the objection was taken at the trial.

Nor can he raise the objection, afterwards, where it affirmatively appears that it was assumed at the trial that the company was a corporation; the defendant at no time intimating that it was not such.

Where individuals, as president and secretary of a rail road company, acting for the company, contracted with the plaintiff for the construction of station buildings for the company, and assigned to him, in part payment, an agree-

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ment between the company and the defendant; and the company, after the buildings were erected, occupied the same, thereby recognizing those persons as their officers, and their authority to do what they had done; *Held* that the official character of those persons and their authority to assign the agreement, in behalf of the company, were sufficiently proved.

Where the defendant, with others, subscribed a writing, by which, in consideration that a rail road company would construct a depot &c., for the accommodation of travelers, at B., he agreed to pay the company \$50, for the purpose of aiding in making said depot and establishing and improving public roads to and from the same; *Held* that the instrument imported a request to the company to construct the buildings and establish and improve the roads; and that a compliance with the request, by the company, so far as to construct the depot, was a sufficient consideration for the defendant's undertaking.

APPEAL from a judgment entered at a special term, upon the report of a referee. The complaint alleged that the defendant severally with *others*, made an agreement with the Buffalo and New York City Rail Road Company, whereby he agreed to pay the said company the sum of fifty dollars, in consideration that the said company would construct a depot, comprising water tank, warehouse, office, &c., at a certain point in the town of Burns, or Dansville; that said agreement was in writing, and at the time of its execution was delivered to the said Buffalo and New York City Rail Road Company; that said company agreed to construct said depot, water tank, &c., and did subsequently build the same; that said agreement subsequently and before the commencement of the action, was duly assigned to the plaintiff, who claimed judgment for fifty dollars and interest from the 18th day of September, 1851. The answer was a general denial of the allegations of the complaint.

The following is the agreement sued on :

“In consideration that the Buffalo and New York City Rail Road Company construct a depot, comprising water tank, warehouse, office, &c., for the accommodation of travelers and freight in the town of Burns or Dansville, at some point between Dea. L. P. Kennedy's east line and the so called Bull lot; we the subscribers severally agree to pay to said com-

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pany the sum set opposite our respective names, for the purpose of aiding in making said depot, and establishing and improving public roads to and from the same.

Dated Burns, Sept. 18th, 1851."

To this the defendant's name was subscribed, for \$50.

The referee found the following facts:

1. That the defendant with others, made, executed and delivered to the Buffalo and New York City Rail Road Company the instrument in writing set out in the complaint, dated 18th Sept., 1851, the defendant being a subscriber thereto in the sum of \$50. 2. That the Buffalo and New York City Rail Road Company, in the fall and winter of 1851, constructed at the point indicated in said instrument, a water tank, and temporary freight and passenger house, which were used by the company until 1854, when the same were replaced by permanent erections for the same purpose, which have since then been used; that their last erections were made by the plaintiff and one D. J. Wood, by virtue of a contract made between them, of the one part, and the said company, by A. D. Patchin, their president, of the other part, dated 10th August, 1854, by which the plaintiff and Wood were to do said work and receive the assignment of said instrument in writing, in payment therefor; that in pursuance of said contract, the company, by A. D. Patchin, their president, assigned said instrument in writing to the plaintiff. 3. That the interest on said fifty dollars subscribed by the defendant since the completion of the permanent buildings, 1st January, 1855, was eight dollars and nine cents. As a conclusion of law, he found the plaintiff was entitled to recover of the defendant the sum of fifty-eight dollars and nine cents, besides costs. Upon the plaintiff offering the agreement in evidence, on the trial, the defendant's counsel objected to the same, on the grounds: 1. That there was no mutual agreement between the parties to the instrument. 2. That there was no allegation in the complaint that the Buffalo and New York City Rail Road was a corporation.

Which objections were overruled by the referee and the de-

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fendant's counsel, excepted. The signature of the defendant to the instrument was admitted by the defendant's counsel, and the same was received in evidence. The plaintiff then offered in evidence the assignment of the said instrument, executed by A. D. Patchin, as president, and R. Pomeroy, as secretary, of the company; which was objected to by the defendant, on the grounds: 1st. That the corporation was not competent to make the assignment. 2d. That there was no proof that the parties executing the assignment were officers of the corporation, at the date of the assignment. 3d. That there was no evidence that the seal affixed to the assignment was the seal of the corporation. 4th. That the president and secretary had no power to contract for the corporation. 5th. That there was no proof that they ever executed the assignments. The objections were overruled by the referee, and the defendant's counsel excepted; and the assignment was received in evidence.

The plaintiff proved that Patchin and Pomeroy acted as president and secretary of the company, and were reputed to be such, at and previous to the date of the assignment, and were recognized as such officers, by the company.

When the plaintiff rested, the defendant moved for a nonsuit; which motion was denied by the referee. Judgment was entered for the plaintiff, for the amount reported to be due.

John A. Van Derlip, for the appellant.

A. J. Abbott, for the respondent.

By the Court, T. R. STRONG, J. It was not necessary for the plaintiff to allege, in the complaint, the incorporation of the Buffalo and New York City Rail Road Company, further than is done by the statement of its name, and of the making of the agreement between the defendant and the company, and what the company did in relation to the agreement. That statement includes the idea of the legal existence of the company; and the fact of incorporation was mere evidence in

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support of it, not essential to be particularly stated in the pleading. No more certainty was required in the complaint, as to the corporate character of the company, than if the company had brought the action; and in that case it would be clear, upon authority, that at common law no specific allegation of incorporation would be important. The name of the company would imply its corporate existence. It would be impliedly averred, by the name, that the company was a corporation. And under the general issue the company would be bound to prove its incorporation. This doctrine is supported by numerous cases; among which I refer to *Norris v. Stops*, (*Hob.* 211;) *Henriques v. The Dutch West India Co.*, (2 *Ld. Raym.* 1535;) *The President of the U. S. Bank v. Haskins*, (1 *John. Cas.* 132;) *The Bennington Iron Co. v. Rutherford*, (3 *Harrison's N. J. Rep.* 105, 158;) *Harris v. The Muskingum Co.*, (4 *Blackf.* 267;) *Richardson v. The St. Josephs Iron Co.*, (5 *id.* 146.) See also *The Dutchess Cotton Manufact. Co. v. Davis*, (14 *John.* 239;) *Bank of Utica v. Smalley*, (2 *Cowen*, 770, 778;) *Bank of Michigan v. Williams*, (5 *Wend.* 478, 482.) The revised statutes of this state have provided a short form of pleading their incorporation by corporations created by or under any statute of this state; and have also relieved such corporations from proving, in actions brought by them, their corporate existence, "unless the defendant shall have pleaded in abatement or in bar that the plaintiffs are not a corporation;" but they have not imposed upon corporations in declaring, the necessity of alleging their incorporation. The common law rule on that subject, as above stated, is wholly unaffected by those provisions.

It has been held in one case, at special term, under the code which makes it a ground of demurrer to a complaint that the plaintiff has not legal capacity to sue, that a corporation suing must show in the complaint how it was created. (*Johnson v. Kemp*, (11 *How. Pr. Rep.* 186.) And this decision has some countenance in another case at general term. (*The Bank of Havana v. Wickham*, 16 *How. Pr. R.* 97.) But in neither

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case was the rule of the common law, that in an action by a corporation the corporate name includes an allegation of the plaintiff's corporate character, which must be proved under the general issue to a declaration, and, upon the same principle, under a general denial to a complaint, under the code, even adverted to; from which I think it manifest, that neither, as to the point in question, received due consideration. That rule is in direct conflict with those cases, and is, I am satisfied, too well sustained by authority to be shaken by them. (*See Union Mut. Ins. Co. v. Osgood*, 1 *Duer*, 707; *The Bank of Waterville v. Beltser*, 13 *How. Pr. R.* 270.) The wisdom and convenience of the rule also strongly commend its preservation.

The defendant is not at liberty to object that the incorporation of the company was not proved, as it does not appear that the objection was taken at the trial. It was incumbent on the defendant to raise the objection there, to entitle him to avail himself thereafter of the omission or defect of proof in respect to that part of the case. If the objection had then been made, it might possibly have been obviated by proof. Besides, it affirmatively appears to have been assumed at the trial that the company was a corporation. In objecting to evidence, the defendant repeatedly designated the company as a corporation; as that there was no allegation in the complaint that the company was a corporation, that the corporation was not competent to make the assignment, the omission of proof that the persons executing the assignment were officers of the corporation, that the seal affixed was the seal of the corporation, that the president and secretary had power to contract for the corporation: at no time intimating that the company was not a corporation.

The official character of the persons who acted as president and secretary in assigning the agreement with the defendant to the plaintiff, and their authority to execute the assignment for the company, were sufficiently proved. They, as such officers, and acting for the company, contracted with the plaintiff,

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for the construction of the station buildings for the company, and assigned to the plaintiff the said agreement towards payment; and the company, after the buildings were erected, occupied the same, thereby recognizing those persons as their officers, and their authority to do what they had done.

The agreement in question clearly imports a request to the company to construct the buildings, and establish and improve the roads specified in the agreement, and a compliance with the request by the company, so far as to construct the depot, which was the consideration, on its part, of the agreement, was a sufficient consideration for the defendant's undertaking. The recent case of *Barnes v. Perine*, (2 *Kern*. 18,) and the cases there referred to, are entirely decisive upon this point, and render any discussion of it unnecessary.

It must be assumed from the report of the referee, that the buildings were erected by the company in pursuance of the agreement; and that was an acceptance of the whole of the agreement by the company, binding them to apply whatever moneys they should receive upon it to the purposes therein mentioned.

My conclusion therefore is, that the judgment appealed from is right and should be affirmed.

[MONROE GENERAL TERM, September 6, 1858. *T. R. Strong, Welles and Smith*, Justices.]

THE PEOPLE, and FLAGG, *vs.* LOWBER, and the MAYOR & C.
OF NEW YORK.

Even if it be conceded that the attorney general may maintain an action, in the name of the people, to restrain a municipal corporation, it can only be to restrain them from making a fraudulent or illegal disposition of the corporate property.

Where such fraud is the foundation of the action, it must be distinctly charged in the complaint.

The resolution passed by the common council of New York in January and February, 1857, authorizing the comptroller to purchase certain land of

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Robert W. Lowber, for the purpose of a market, was within their powers, as conferred by the city charter. And in passing such resolution the common council did not violate any of the restrictions contained in the charters of the city.

The common council of New York may order land to be purchased, for a market, notwithstanding the limitation in the charter as to the yearly value of land which the corporation may hold.

MOTION to dismiss the complaint, on answers denying the material allegations therein.

William Curtis Noyes, R. Busteed, John M. Barbour and E. P. Cowles, for the motion.

James R. Whiting, opposed.

INGRAHAM, J. This action is brought in the name of the People and A. C. Flagg, as comptroller of the city, and a corporator and tax-payer, on his own behalf, and on behalf of all other corporators and tax-payers, against the defendants, to obtain an injunction staying the proceedings upon a judgment, and praying that the judgment recovered by the defendant Lowber may be set aside, and that the defendants, the mayor, aldermen and commonalty of the city of New York, may be enjoined from completing the purchase of certain land, from Lowber, for a market purpose, and to declare such contract void. The common council, by resolution, directed such purchase to be made, in January, 1857, by the board of aldermen, and in February, 1857, by the board of councilmen, and which resolution became a law at the expiration of ten days, by the omission of the mayor either to sign or return the same with his objections thereto. The defendant Lowber thereupon prepared a deed, and submitted the same to the counsel of the corporation, who approved thereof, and of the title to the property therein described. The deed was tendered to the mayor and comptroller, who refused to accept the same or complete the purchase. Subsequently Lowber brought an action against the mayor &c., and recovered against them the amount

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of the consideration money of the said premises so agreed to be sold, and has issued an execution therefor. The cause was brought on upon the pleadings, and a motion was made to dismiss the complaint for the reasons hereafter stated.

The complaint alleges various reasons: such as want of power to make the purchase; the improper mode of making it—by the resolution, and not by the comptroller; that the purchase was illegal; that the price paid for the land exceeded its value; that the property was encumbered by mortgage; and that, in passing the resolution for the purchase, the common council was guilty of an abuse of trust and usurpation in office. The defendants, Lowber, and the mayor, aldermen, &c. have filed their answers denying the allegations upon which the plaintiffs' action is founded. This action was brought in pursuance of an order made by this court at general term, in the action of Lowber against the mayor &c., on the motion to modify the order staying proceedings, in which an action was required to be commenced in the name of the comptroller, or some other tax-payer; and security was to be given for damages arising from the injunction. Since that order was made, the general term of this district has decided that no tax-payer could maintain such an action. This decision would control me as to the maintenance of this action in the name of a tax-payer, whatever might be my opinion upon the question then submitted to the general term: and so far as it is sought to maintain this action in the name of the comptroller, as a tax-payer, under that decision, I would be bound to dismiss the complaint.

The people of this state are also joined as plaintiffs; and the question is thus presented whether they can maintain an action against a municipal corporation for any alleged fraud in making a contract, or to prevent the exercise of powers not possessed by them under their charter. Proceedings by way of information have often been brought in England and this country against corporations, and are common in the books. Those proceedings have repeatedly been sustained to

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restrain such corporations from doing acts in violation of their charters, or from exercising powers not possessed by them. In *The Attorney General v. The Birmingham and Oxford Rail Road Co.*, (8 *Law and Eq. Rep.* 243,) the lord chancellor says: "The attorney general has not the power to restrain public companies from doing an act which they are authorized to do, where it interferes with the rights of the public; but it is a different thing to say, where a work is authorized to be done, that he may restrain the doing of the work, until the company shall perform other work." Again: "Where acts are being done injurious to the public interests, inasmuch as the public interests might otherwise be neglected, the attorney general has in such a case authority to represent the public." In the *Attorney General v. Wilson*, (9 *Sim.* 30; 1 *Jur.* 800,) it is said, "The court has jurisdiction to relieve against collusive alienation of corporate property." The cases cited in the *Attorney General v. Utica Ins. Co.* (2 *John. Ch.* 370,) seem to hold a contrary opinion, or at least to leave the question in much doubt. By the 428th section of the code, proceedings by information are abolished, and an action is substituted for it, and the enumeration in sections 429 and 430, specifying in what cases the attorney general may bring an action in the name of the people, adds to the difficulty. It must be observed, however, that all these were cases brought in the name of the attorney general, and not in the name of the people of the state. How far any action may be maintained in the name of the people for such a cause, may well be doubted. I do not, however, consider it necessary for the disposition of this case, to decide that question now. Even conceding that the action may be maintained in the name of the people to restrain municipal corporations in certain cases, I have no hesitation in adopting the conclusion that those proceedings cannot be carried to the extent to which it is sought to use them in this action. If the action can be maintained at all, it can only be to prevent the commission of fraudulent acts in regard to corporate property, and the doing of acts not authorized by their charter.

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However unwise, improvident, extravagant, or unnecessary a purchase a municipal corporation may intend to make, neither the attorney general nor any tax-payer has, in my judgment, any right to interfere by action and by injunction. The common council have the power, under their charter, to provide for and regulate markets. They have the sole right to establish public markets. It is a franchise which is conferred upon them by the supreme authority, and with it is conferred all necessary power to carry into effect the exercise of that right. It would have been an idle grant to the city authorities to confer on them the franchise of establishing and regulating the public markets, and at the same time withhold the power to procure the place where such market should be built. It would be an idle grant to bestow upon them the right of collecting the fees of the markets which they should thus establish, and yet prohibit them from purchasing the place necessary for earning such fees. I think there can be no doubt that the principle is a correct one, that the grant of the franchise relative to markets, in the city charters, necessarily carries with it the right to purchase the land on which such market is to be established. But it was said, even if so, the power is controlled by the limitation of the corporation as to the real estate which it may hold, in the provision allowing the purchase of lands, not exceeding in the whole the clear yearly value or rent of £3000. It may well be questioned whether, under the various acts of the legislature, any force remains in this limitation. The legislature having repeatedly provided by law for the purchase of lands which far exceed in value and rent the amount to which the corporation was originally limited, have virtually annulled this provision, and rendered it nugatory. The income from property thus authorized to be purchased, far exceeds in value the limited amount, exclusive of the increase which has taken place in the property purchased originally within that limitation. But if there be any virtue remaining in the restriction, there are several reasons why it does not apply to the purchase in this case. One reason is that

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before stated, that the right to establish a market or markets at such places as shall from time to time be ordered, established, and erected, by the common council of the city, (*Kent's Charter*, p. 59,) necessarily conferred the power to hold the land on which such market was to be erected. No revenue is to be derived from the lands purchased for a market, if so used, except for market purposes. These fees the city is authorized to receive. Such revenue, therefore, cannot be considered as coming within the limit before referred to. The grant of power to establish as many markets as the common council should think fit, thereupon clearly shows that in bestowing such a power the legislature contemplated that the increase of the city would require from time to time an increase of markets for the use of the inhabitants. Under such circumstances it would be unreasonable to say that the legislature, at the same time when providing for the necessities of the inhabitants of the city, in giving them the markets needed by them, should have, by a limitation as to the value of the land to be purchased by the corporation, deprived them of the means of carrying into effect these provisions.

These views are fully sustained by the case of *Ketchum v. The City of Buffalo*, (21 Barb. 294.) The court says, "The power to establish a market being granted, all the powers necessary for the exercise of this power are implied. The power expressly granted, or right expressly given, could not be carried into effect or exercised without land, and therefore the common council had the power to purchase, take and hold the land necessary for the establishment of a market;" although in that case other provisions of the charter authorized the purchase of the land, still, that does not weaken the force of the argument on that point. The two provisions of the charter must be so construed as to give effect to both; and, while this limitation is to be applied to the purchase of land by the city for other purposes, (if it now has any force whatever) it does not destroy or control the right previously conferred, to erect and establish markets, and, as a necessary consequence,

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to purchase lands therefor, as the corporation should deem proper.

These views dispose of the objection that the common council, in buying this land, did an act not authorized by the charter, and exceeded the limitation in the charter as to the amount of real estate they were authorized to hold.

It is also urged, in favor of maintaining this action, that by the charter, no executive business should be performed by the common council, but that the executive power of the corporation should be vested in the heads of the departments. Without stopping to examine the question, whether the purchase of land by an ordinance or resolution, is an executive act within the meaning of the charter, of which I entertain great doubt, there is clearly, in the resolutions passed by the common council for the purchase of this land, no violation of that section (Sec. 9, Amended Charter.) The resolution authorizing the purchase, directs the comptroller to make the purchase for the use of a market, limiting him as to price, and defining the dimensions of the land to be purchased. The comptroller had previously advertised for and received proposals for the sale of the land in that neighborhood, and had submitted such proposals to the common council. The selection from those offers, of the land best suited for the purposes contemplated, and the limitation of the price, was a legislative and not an executive act, within the province of the common council, and was properly exercised by them. The duty that was executive was making the contract, receiving the deed, and making the payment. This duty was by the resolution confided to the comptroller; and, so far as any thing appears before me, I see no executive act performed, or attempted to be performed, by the common council in this matter. I do not understand this section as taking from the common council the right to control by legislation the discretion of the officer, in selecting themselves the site, and fixing the price at which the purchase is to be made; but, after these things are settled by an act of legislation, they cannot either by a committee or otherwise, do any thing

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to carry into effect that legislation. Such powers must be exercised by the head of the department. The want of an appropriation out of which this money was to be paid, is not a ground for maintaining this action. It might have been different in the action brought by the defendant against the corporation to recover for the land so to be sold; or, if a mandamus had been moved for, it might have been an answer to such an application, but it affords no ground to the attorney general to proceed against the defendants to restrain them in the manner asked for in the complaint.

These are all the grounds on which the plaintiffs' counsel seek to restrain the defendants, except the alleged fraud on the part of the corporate authorities. If any such fraud is charged, equity can give relief on a proper application. The corporation might undoubtedly apply, and where the common council is so frequently changed in its members, the fair supposition is, that a successive body would require such a proceeding to be commenced, if they believed fraud had existed. There is still time for the present common council to institute proceedings if any fraud has been discovered. In the absence of proceedings on their part, I have, for the purposes of this action, conceded that the attorney general might commence the action. It is, therefore, unnecessary to examine the complaint, to ascertain whether any such fraud is charged in the transaction as would vitiate the proceeding.

Where the whole foundation of the action rests upon fraud, such fraud should be charged as the ground of the action. If, without such allegation, the people, by the attorney general, have no right to interfere, then it should be shown by the complaint that the parties had been guilty of acts of fraud, which would authorize the court to restrain the collection of a judgment that appears to be regular. The complaint shows the above proceedings by the common council, in authorizing originally the purchase by the comptroller; the presentment of the deed by Lowber and demand of the purchase money; the action brought by Lowber and recovery of judgment thereon; that

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such action was referred by consent of parties ; that an execution was issued thereon ; that the price to be paid therefor was double the value of the property ; that the title was defective ; that the counsel to the corporation reported the title to be good ; that the land was encumbered by a mortgage ; that the counsel to the corporation refused to take any measures for the relief of the corporation ; that an application was made to the corporation, and they passed resolutions upon the subject, which the complaint avers to have been passed by them regardless of their duty ; that the mayor suffered the resolutions to become law, without signing or vetoing the same, surreptitiously ; that the action was referred by the counsel, and judgment suffered through neglect ; that the comptroller applied to the court to have the judgment opened, which was opposed by the counsel of the corporation, and Lowber, on the ground that the comptroller had no right to interfere, or to be heard on such motion ; and that an order was made by the general term, providing for bringing this action and for giving security thereon.

It appears to me that these facts as stated in the complaint do not show such a state of things as will warrant the court in charging fraud upon the common council. No fraud is averred. They are charged with neglect of duty in refusing to apply to set aside the judgment and with proceeding in violation of the provisions of the charter, but no fraud is charged against them, and under this complaint no fraud could be proven by which the plaintiffs could succeed.

I do not consider that the discretion of the common council in legislation can be controlled by the courts. If they have authority to legislate, their discretion as to what should be passed or rejected is a matter exclusively for themselves. They may pass improvident laws, they may make improvident purchases, they may pay for land prices which some would think exorbitant, but neither the attorney general nor a tax-payer has a right to call them before the courts to show that their legislation was indiscreet, that the prices paid by them did

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not exceed the actual value, or that it was wise to pass the ordinances or resolutions they may adopt.

Nor are the acts of the counsel any ground for maintaining this action. It was his duty to examine the title and comply with the directions of the common council, so far as those directions did not conflict with the law. His consent to refer the cause of Lowber against the corporation, even if ill-advised, was not illegal, but was expressly authorized by the code, which provides for the reference of all causes by consent. His objections to the motion in the supreme court to open that judgment were made in pursuance of a resolution passed by the common council after full knowledge of the transaction in regard to the recovery of the judgment, and of a resolution directing him to take measures to enforce payment of said judgment, which were passed by the common council and approved by the mayor in August, 1857. This deliberate action of a subsequent common council, without any charge of fraud on their part, must be treated as a ratification of the action of the previous common council in authorizing the purchase, and the counsel to the corporation would have departed from the line of his duty if he had, for any supposed want of discretion on the part of the common council in passing the resolution of purchase, or improvidence in making the contract, attempted to disobey such resolutions. The heads of departments do not hold their places independent of the legislation of the common council, and where such legislation is not in violation of law they have no right or power to refuse obedience to such legislation because they may deem it unwise or improvident. On the contrary, they are only in the legitimate discharge of their duties when they comply with the legislative directions of the common council, not passed in violation of law. There is no difficulty on the part of the common council in instituting this action in the name of the corporation, if they believe the contract to have been made fraudulently or illegally; and when two successive common councils have refused to make any attempt to set aside the contract, and have expressly di-

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rected the counsel to take measures to compel the payment of the money, the acts of the counsel in carrying out those resolutions cannot be condemned.

My conclusions are, that if it be conceded that the attorney general may bring an action in the name of the people to restrain a municipal corporation, it can only be to restrain them from making a fraudulent or illegal disposition of the corporate property.

That such fraud must be distinctly charged in the complaint, where it is the foundation of the action.

That no fraud is charged in the complaint in this action upon which the same can be sustained.

That the resolution passed by the common council authorizing the comptroller to make the purchase of the land in question was within their powers as conferred by the charter.

That the common council may order land to be purchased for a market, notwithstanding the limitation in the charter as to the yearly value of land which they may hold.

And that in passing such resolution; they did not violate any of the restrictions contained in the charters of the city.

The motion to dismiss the complaint is therefore granted.

[NEW YORK SPECIAL TERM, September 11, 1858. *Ingraham*, Justice.]

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Where a complaint set forth an agreement between the parties, by which the defendant promised to take, and vend, certain goods belonging to the plaintiff, and to account to the plaintiff, at certain stipulated prices, for all that he should sell of the same; and that he should receive, for his services, all sums which might be realized upon the sale of the goods, over and above the stipulated prices, and should return to the plaintiff the goods which he might not be able to sell, in good order; but there was no allegation of a conversion; and the complaint, after alleging a demand of the defendant that he would return the goods or account for the avails, pursuant to the

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agreement, alleged as a breach, that the defendant had neglected and refused to account, &c. ; *Held* that the action was upon *contract*, and not for a tort ; and that *infancy* constituted a good defense.

A finding of a referee, in such a case, that on &c. (before the defendant was of lawful age) the plaintiff demanded of the defendant that he should return the goods, and that the defendant *has not returned them*, is not a finding of a conversion ; nor will the facts justify such a finding.

Under such circumstances, there is no ground for the application of the principles of confirmation or ratification, after the defendant became of age ; where it does not appear that he did any act whatever, or that any demand was made of him, after he attained his majority ; or that the unsold goods were not still in his possession, safe and uninjured, at the time the action was commenced.

APPEAL from a judgment entered upon the report of a referee. The action was upon contract. The referee found that in December, 1854, the parties entered into an agreement, by which the defendant should take and vend certain goods, wares and merchandise, the property of the plaintiff, to be delivered by the plaintiff to the defendant, and should account to the plaintiff, at certain stipulated prices, for all that he should sell of the same ; and should receive for his services all sums which might be realized upon sale of the same, over said stipulated prices ; and should return the goods which he might not be able to sell, in good order, to the plaintiff. The referee also found that the plaintiff delivered the goods to the defendant ; that the defendant sold a portion of the goods, of the value of \$36, and that he paid to the plaintiff \$4, and had in his possession, unsold, in March, 1856, goods of the value of \$114.80. He also found that in March, 1856, the plaintiff demanded of the defendant that he should return said property. He also found that the defendant did not return any part of the property to the plaintiff. The action was commenced November 10, 1856. The defendant became 21 years old April 6, 1856. The referee found, as a conclusion of law, that the plaintiff could not recover, by reason of the infancy of the defendant at the time the agreement was made.

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E. B. Hinsdale, for the plaintiff.

C. Danforth, for the defendant.

By the Court, MARVIN, J. The judgment must be affirmed. Infancy constituted a defense. The plaintiff's counsel has attempted to put the case upon the ground of a conversion of the goods, but in this he fails. The action is upon contract. The complaint is clear and specific. There is no allegation of a conversion. After alleging a request and demand of the defendant, that he would return the goods, or account to the plaintiff for the avails thereof pursuant to the agreement, the breach is alleged, viz: that the defendant has neglected and refused, and still neglects and refuses to account therefor, &c.

Nor does the referee find facts sufficient to charge the defendant as for a conversion of the goods; or rather, he does not find any conversion. He finds that the plaintiff, in March, (before the defendant was of lawful age,) demanded of the defendant that he should return the goods; and that the defendant has not returned them. If my goods are in the possession of another, and I demand them, and he refuses to deliver, this is evidence simply of conversion. It is evidence, unexplained, that the possessor sets my claim at defiance, and that he claims the goods. And from such evidence, a conversion may be found. But the refusal to deliver is not itself a conversion: it is simply evidence from which a jury may find that there was a conversion. In the present case the referee has not found that there was any conversion by the defendant. Nor did the facts, as he states them, justify, in my opinion, his finding any conversion, assuming the defendant to have been an adult. The goods were delivered to the defendant, an infant, upon a special agreement by which he was to sell and account for the goods; or he was to return to the plaintiff those which he should not be able to sell. The plaintiff demanded that he *should return* the goods (not sold.) The plaintiff required the defendant to do some act which was con-

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sistent with the contract, and the defendant neglected to do the act. There may have been a breach of the agreement, in neglecting to return the goods; or there may not have been a breach. The defendant may have insisted that he should be able to sell the goods. There was undoubtedly a breach of the agreement in neglecting to account for and pay over the amount, \$36, received for goods sold. But there is no finding of any conversion. From aught that appears in the case the goods unsold remain to this day in the possession of the defendant, unused and as they were delivered to him. It was a part of the agreement that he should, in a certain event, return to the plaintiff the unsold goods. Infancy was as valid a defense to this part of the agreement as to any part of it. The plaintiff, however, if the defendant refused to perform the agreement, could go and take the goods himself. And if he demanded them, and the defendant refused to deliver them, without any just cause for the refusal, a jury or referee might, in the case of an adult, and perhaps in this case, find a conversion. The referee has not found such facts; nor has he found a conversion from the facts he states. He has simply found that the defendant has not *returned* the goods.

It may be well to notice, a little further, the position of the plaintiff's counsel. He assumes that he established a cause of action, as for a conversion of the goods, and then argues that though the form of the action be *ex contractu*, if in substance it be *ex delicto*, infancy is no defense; and he cites *Bristow v. Eastman*, (1 *Esp. N. P. C.* 172.) In that case the action was assumpsit for money had and received, to recover money which the defendant had *embezzled*; and it was held that though the action was in its form *ex contractu*, yet it was in substance an action *ex delicto*, and that the infant should not escape from his liability for the tort. That case has no application to the present case. Kent, (2 *Com.* 241,) says, "Infants are liable in actions arising *ex delicto*, whether founded on positive wrongs, as trespass or assault; or constructive torts, or frauds. But the fraudulent act, to charge

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him, must be wholly *tortious*; and a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort, in order to charge the infant in trover, or case, by a change in the form of the action. He is liable in trover, for *tortiously converting* goods entrusted to him, and in detinue, for goods delivered upon a special contract for a specific purpose; and in assumpsit for money which he has fraudulently embezzled."

In the present case, there is no ground for the application of the principles of confirmation or ratification after the defendant attained his majority. It does not appear that he did any act whatever after he attained the age of twenty-one. The goods were delivered to him, upon a special contract, when he was an infant, and there is nothing, appearing in the case, to show that all the goods not sold while he was an infant, were not in his possession, safe and uninjured, at the time the action was commenced. And for aught that appears, had the plaintiff called for the goods after the defendant became of age, he would have received them. The plaintiff should have taken some steps other than those appearing in the case, before commencing his action, for the purpose of putting the defendant in the wrong, or giving him an opportunity to discharge himself of the trust by delivering the goods to the plaintiff, or suffering the plaintiff to take them.

The judgment is affirmed.

[ORLEANS GENERAL TERM, September 13, 1858. Grover, Marrin and Davis, Justices.]

WRIGHT *vs.* THE NEW YORK CENTRAL RAIL ROAD CO.

The section of the code which limits the right of examining a plaintiff as a witness, to cases in which the adverse party or person in interest is living, should be so construed as to admit a person who has an action with a *corporation*, to be a witness in his own behalf.

Although it is settled law that a principal is not liable to a servant for injuries sustained by reason of the negligence of another servant, when both are engaged in the same general business, in the service of the principal, yet it is the duty of the master, to all his servants, to use reasonable care in providing them with careful and competent fellow servants; and he is liable for injuries to any servant arising from his neglect to use such care; in the absence of proof that the injured servant was aware of the incompetency of his fellow servant.

The power to employ servants may be delegated by the principal; especially when the principal is a corporation. When the principal thus acts by an agent he will, upon general principles, be liable for the negligence of the agent. Such agent will not be regarded simply as a fellow servant of those whom he employs in the general business.

In an action against a rail road company, brought by a brakeman in its employ, to recover damages for an injury sustained by means of a collision, it is not erroneous for the judge to charge the jury that it was the duty of the defendant to use reasonable care, in order to employ an engineer of competent skill and experience; and that if they find that ordinary care was not used, in providing the engineer on the occasion of the collision, and the injury to the plaintiff was occasioned by such negligence, the defendant is liable for the consequences.

It is negligence in a rail road company so to arrange its time-tables as to permit trains approaching a station from opposite directions, on the same track, to reach the station at the same moment.

And this, although one of the trains is directed to run off upon a side track, at the station; if experience shows that there is danger, especially in a dark night, of a train running past the switch at the station, and thus coming in collision with the other train.

MOTION by the defendant, for a new trial, upon a case and exceptions. The plaintiff was in the employ of the defendant as a brakeman, and on the night of the 6th of June, 1856, was injured by a collision of the trains, at Pekin, eight and a half miles east of Suspension Bridge, on the road to Rochester. It was conceded by the plaintiff, on the trial, that a servant, sustaining injury by reason of the carelessness and negligence of a fellow servant in the same employment

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could not recover. It was claimed by the plaintiff that the injury in this case was occasioned by the negligence of the defendant, in employing an incompetent engineer, upon the train going east from the bridge. Also in arranging the time table so that the trains should meet at the same time at Pekin. Wm. H. Adams was the engineer alleged to have been incompetent. He was employed by Mr. Upton, the managing agent of engineers and the person authorized by the defendant to employ engineers. Mr. Adams was a witness for the plaintiff. He had been an engineer some four years, and had been in the employ of the defendant 19 months, during which time he had run trains over the road from Suspension Bridge to Rochester about 12 times, and had ridden on the cars at other times. He had, as engineer, run two trips with passenger cars, before the collision. He had, for most of the 19 months, been employed in running trains from Buffalo to Lewiston. The evening before the collision, Adams was in Rochester, and Upton told him, as he says, that on account of the sickness of the engineer of the "J. A. Willink," he would have to come down with the express train the next night. He says he told Upton that he did not feel competent to take the train over the road in the night; in the day time he could take any train over the road. Upton says he heard nothing from Adams about his want of acquaintance with the road. Mr. Jackson was present at the conversation between Upton and Adams, and he does not speak of Adams' saying any thing about not feeling competent to take the train over at night. Adams went to the bridge, that night, with a freight train. Adams states that he should want three weeks knowledge of the road, by running every day, to get acquainted with it; that it is essential to know the objects, so as to know when you are approaching stations; that he had not run on that road often enough to know it. The time for leaving the bridge was 9 o'clock and 20 minutes. It actually left at 9,30. Pekin, eight and a half miles from the bridge, was the first station, and the train was

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due there at 9,40. The night was dark and foggy. Adams says that on reaching Pekin he saw a train; that it appeared to him to be on the switch coming west; that he thought it was stationary; that he had got about half way of opposite the station—about the middle of the side track—before he discovered that the other train was not on the side track. That there were two switches—one at the east end of the station, and the other at the west. That he had shut off steam, reversed the engine and put down the brakes, but not in time to avoid the collision. Anthony Powell was the engineer on the up train. He testified that as he approached Pekin he saw the head light of the down train, and supposed the train stationary. That he put his head out of the window, and from the noise the other train was coming very fast. When he first saw the light, it may have been 40 rods distant. He says he was a little ahead of time. His instructions were to go on time, and get on to the switch and wait until the down train came. Both engines were furnished with time tables, in which both trains were due at Pekin at 9,40. The up train was to go on to the switch. Carpenter was the conductor of the down train, and he and Adams had a conversation, before starting from the bridge, in which Carpenter told Adams that in case the up train had not arrived at Pekin he was to stop five minutes. Carpenter says that in this conversation Adams remarked "We meet the express at Pekin, and if not there we wait five minutes for variation of watches." And he told Adams he had better stop there, any way, to make a sure thing of it. He says the time, 9,40, was just up when Adams gave the signal to brake. The collision occurred before the up train had run on to the switch. The plaintiff was sworn and examined as a witness, under objection and exception.

A part of the injury to the plaintiff was a broken leg, and some seven or eight weeks after the injury he had so far recovered that he could walk about, when, by slipping down upon the sidewalk, the leg was again broken. The leg was badly

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twisted before the second breaking. The defendant objected to any evidence to show the state of the leg, after the second breaking. The objection was overruled, and the defendant excepted. The defendant gave evidence tending to show that Adams was a competent and skillful engineer. Also evidence tending to show that an engineer who has run over a road two or three times is competent, with a time table, to take charge of a train. Some of the witnesses say, three or four times, and that by running a freight train the engineer has more time for observation, to enable him to become acquainted with the road.

When the plaintiff rested, the defendant moved for a nonsuit, on the grounds, 1. That the evidence was not sufficient to justify submitting to the jury the question whether the injury to the plaintiff had been caused by the negligence of the defendant. 2. If the evidence tended to show negligence in Upton, the defendant was not chargeable with any of the consequences of such negligence. 3. That the evidence did not show negligence in Upton, because Adams was shown to have been competent, and had had abundant means to become acquainted with the road. 4. That if there were any defects in the time tables calculated to work injuriously, the defect, in this case, was caused by specific instructions to the engineer, and by the engineer's own knowledge of the facts. The motion was denied, and the defendant excepted.

The judge charged the jury, among other things, that if they should find that the injury was occasioned by the negligence of the defendants they were at liberty fully to compensate the plaintiff not only for his loss of time, expenses and trouble, but for the pain and suffering he had endured, in consequence of the injury. That it was the duty of the defendant to use reasonable care in order to employ an engineer of competent skill and experience; and if the jury should find that Upton did not use ordinary care in that respect in providing the engineer on the occasion in question, and the injury was occasioned by such negligence, the defendant was liable

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for the consequences. The defendant excepted to the charge, upon each of these propositions. Verdict for the plaintiff, for \$2500.

J. H. Martindale, for the plaintiff.

T. Hastings, for the defendant.

By the Court, MARVIN, J. No error was committed in allowing the plaintiff to testify as a witness in his own behalf, though the defendant was a corporation. It is true that the code limits the right of examination to cases in which the adverse party or person in interest is living. It is said that the adverse party or person in interest is, in this case, a corporation, and that life, or living, cannot with propriety, be applied to corporate existence. It may well be that the present case did not occur to the legislature, when the statute was enacted; but the design was to admit, as a witness, a party to an action whenever the adverse party or person in interest could also be a witness. A corporation could never be a witness, but a corporation is composed of a person or persons, who are natural persons and are interested in the corporation, and they can be witnesses. I have no doubt the code (§ 399) should be so construed as to admit a person who has an action with a corporation, to be a witness in his own behalf.

It was not error to admit evidence to show the state of the plaintiff's leg after the second breaking. Evidence of the second breaking had been given without objection, and it was important that the jury should know the condition of the leg before and after the second breaking, in order that they might be able to determine for what injury the defendant was liable. It was not claimed that the defendant was liable for any injury other than that which happened at the time of the collision.

Was any error committed in the charge to the jury? It is settled law in this state, that a principal is not liable to a servant for injuries sustained by reason of the negligence of

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another servant, when both are engaged in the same general business, in the service of the principal. (*Coon v. The Syracuse and Utica Rail Road Co.*, 1 *Selden*, 492.) This principle was conceded in the present case, by the plaintiff, who claimed to recover on account of the negligence of Upton, its managing agent. If the servant is injured by reason of the negligence of the master, the latter is undoubtedly liable.

As the general business of managing a train of cars upon a rail road requires the co-operation of many persons, and as they are supposed to know the risks incident to the business, they voluntarily take those risks at the time they enter into the employment of the rail road company, and the compensation to be paid them may be affected by the character of the business. As one servant may be injured by the carelessness of a fellow servant, he takes this risk. The business requires all the servants, and some one or more of them, though possessed of sufficient skill and capacity, may, on some occasion, be careless and negligent, and a fellow servant may be injured in consequence. In such a case, the master or principal is not responsible. But it may be that one of the servants, employed by the master, to co-operate with the other servants, is incompetent, and lacks the requisite skill to perform his part of the work. He may be a careful, prudent servant, but from ignorance of his duties, or from the absence of the necessary skill, may be unable to perform them, and a fellow servant may sustain injury in consequence of his incompetency. Is the principal then liable? It is, I have no doubt, the duty of the master, to all his servants, to use reasonable care in providing them with careful and competent fellow servants, and he is liable for injuries to any servant arising from his neglect to use such care, in the absence of proof that the injured servant was aware of the incompetency of his fellow servant. If the injured servant has knowledge of the incompetency and want of skill of his fellow servant, a presumption may arise that he consents to take upon himself the risk of any injury which may result from such incapacity. He may, if the mas-

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ter employs an incompetent co-laborer, quit his employment; unless the master will, upon notice, discharge the incompetent servant.

As the master or principal has the sole right to employ all his servants, each servant has the right to rely upon the master's using reasonable care and diligence in employing none but competent servants. The power to employ servants may be delegated by the principal, and this must generally be so, when the principal is a corporation. When the principal thus acts by an agent he will, upon general principles, be liable for the negligence of the agent. This agent will not be regarded simply as a fellow servant of those whom he employs in the general business. (*See Pierce on Am. Rail Road Law, ch. 13, and the cases there cited; Keegan v. The Western Rail Road Corporation, 4 Selden, 175.*)

In the present case, Upton had authority to employ the engineers. He was the managing agent. He employed Adams. There can be no reasonable doubt that the injury to the plaintiff was caused by the carelessness and negligence of Adams. He left the bridge at 9 o'clock 30 minutes and ran to Pekin, $8\frac{1}{2}$ miles, in a fraction over 10 minutes. He failed to arrest the progress of the train in time, and the collision occurred before the up train could run upon the switch. He must have run east beyond the east end of the switch. But the liability of the defendant does not depend upon the negligence of Adams. The questions presented are, 1. Was Adams incompetent? 2. If so, was there negligence in Upton in employing him and putting him in charge of that train, as engineer? • Waiving the question arising out of the time tables, both of the questions here presented must have been found in the affirmative before the plaintiff could recover. The defendant did not warrant that Adams was competent. If Upton, as the managing agent of the defendant, used proper care, in employing Adams and placing him in charge of the train, the defendant is not liable. As I understand the charge, it was in accordance with the views here presented. The learned judge

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instructed the jury that it was the duty of the defendant to use reasonable care in order to employ an engineer of competent skill and experience; and if the jury found that Upton did not use ordinary care, in that respect, in providing the engineer on the occasion of the collision in question, and the injury was occasioned by such negligence, the defendant was liable for the consequences. It may be said that this proposition does not include the question of the *competency* of Adams; or rather, perhaps, that it assumes that he was incompetent and makes the question turn upon the care and diligence of Upton in employing him. The duty of Upton is properly stated; and then follows the proposition that if such duty was not performed, and the *injury was occasioned by such negligence*, then the defendant was liable for the consequences. The duty was to use reasonable care in order to employ an engineer of competent skill and experience. If, in fact, Adams was competent, skillful and experienced, then there was no want of proper care on the part of Upton. The jury must have found that Adams was incompetent, and that Upton did not use reasonable care in employing him. If the charge failed to present, fully and clearly, the principles involved, the defendant should have requested further instructions. In my opinion we cannot say that the charge, as it is, was erroneous.

The proposition that if the injury was occasioned by the negligence of the defendant, the plaintiff could recover, is sound. It has reference, I suppose, to the question arising out of the time tables.

In my opinion no error was committed by the court; unless it was error to refuse to nonsuit the plaintiff. And I shall consider this question briefly, in connection with the motion now made for a new trial upon the ground that the verdict is against evidence. Aside from the question growing out of the time tables, I confess that I am not satisfied with the verdict. The question turns upon the competency of Adams, assuming that Upton was negligent. As to his competency, I certainly should have been better satisfied if the jury had found Adams

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competent. He had served as an engineer some four years, and he had been in the employ of the defendant 19 months, but not on the road from the bridge to Rochester. He had, however, as engineer, run over the road a dozen times, in the 19 months, and had ridden on the cars at other times. He had run up to the bridge with a freight train, the night before. Several witnesses of the defendant, engineers, state facts tending strongly to show that such an acquaintance with a road was amply sufficient. Adams, upon whose evidence as to his competency the case of the plaintiff rests, puts his incompetency upon the sole ground of a want of sufficient acquaintance with the road to enable him to run the train safely in the night. He says that he should want three weeks' knowledge of the road by running every day, to get acquainted with it. His remark to Upton, if he made it, that he did not feel competent to take the train over the road at night, is very slight evidence to prove the fact of incompetency. If he did so feel, it might be evidence of a want of confidence in himself. Upton denies that Adams made any such remark, and Jackson, who was present, does not in his evidence speak of any such remark. They both say that Adams said he thought it was laying it on some too thick, after coming with a freight train; thus complaining, &c.

Was Upton negligent, in employing Adams? He was first employed 19 months before, upon the recommendation of three master mechanics and foremen for rail road companies. He had served the defendant for more than a year and a half as an engineer, and so far as we learn, with skill, giving abundant evidence of competency. Was Upton negligent, when he relied upon his knowledge of Adams as an engineer? But here comes in, and undoubtedly with telling effect upon the jury, the remark of Adams to Upton that he did not feel competent to take the train over the road at night; thus, as it was probably argued, showing that Upton had notice of Adams' incompetency, and that he therefore did not use reasonable care in employing him in that service.

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If the question raised by the time tables was not in the case, I am inclined to think that the verdict ought to be set aside as being against the evidence. I think the decided weight of the evidence is adverse to the positions that Adams was incompetent; or that Upton did not use proper care and diligence in entrusting the train to him. But the case is embarrassed with the question growing out of the time tables. By them the approaching trains were to arrive at Pekin at the same moment. It is true that the up train was to run on to the switch or side track, and Adams had instructions to stop, and if the up train had not arrived, to wait five minutes. If the trains should reach Pekin at the same time, and one of them should go on to the side track and the other remain on the main track, no collision could happen. But suppose the down train should arrive one or two seconds sooner than the up train, and should not be stopped precisely at the right spot, but should run past the east end of the switch, a collision would most likely occur. This was precisely what happened in the present case.

It appears from the testimony of Adams that there were two switches at Pekin; one at the east end of the station, and one at the west. I suppose there was but one side track. What the length of this side track was does not exactly appear. Carpenter says that when he stepped out, they might have been over the switch a rod. This was perhaps 300 feet west of the stopping place. Adams had not, at that time, signalled to brake. I infer that the side track was between 600 and 700 feet in length, and Adams ran the whole length and some further. Now so far as the defendant is concerned the question is presented, was it negligence to require or permit approaching trains to reach this station at the same moment? And this was a question of fact to be solved by experience in running trains. If there is no difficulty in stopping the train at the proper place, and no danger of running by at any time, including the night, then timing the trains in this manner would not be negligence; assuming, of course, that the up

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train should run on to the side track. But if experience shows that there is danger, especially in a dark night, of the down train running by the east switch, then it would be gross negligence to provide for the arrival of the trains at the same moment, as there would be great danger of a collision. The case is quite meagre of evidence touching the question of the danger of running by. We have the evidence of what actually occurred in this case. Adams says: "The night was damp and foggy; on reaching Pekin I saw a train; it appeared to me to be on the switch, coming west. I mean the side track off the principal track. I thought it was stationary. I had got about half way opposite the station, which is about the middle of the side track, before I discovered that the other train was not on the side track. I had shut off steam, and down brake, and reversed my engine; but not within sufficient time to avoid collision."

Upon the whole, I have come to the conclusion to let the verdict stand. I cannot say that it is so against the evidence upon all the controlling questions in the case as to require that it should be set aside.

Judgment affirmed.

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PALMER vs. HASKINS.

In an action for slander, or libel, the pecuniary circumstances of the defendant are not involved in the issue, and evidence showing him to be rich or poor ought not to be received.

THIS was an action for slander. The plaintiff gave evidence having a tendency to prove the cause of action, and then, for the purpose of showing the defendant's pecuniary ability to respond in damages, introduced evidence, under ob-

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jection and exception, tending to prove the pecuniary circumstances of the defendant. There was a verdict for the plaintiff.

Wakeman & Bryan, for the plaintiff.

Kimberly & Tyrrel, for the defendant.

By the Court, MARVIN, J. This action was tried before me. I have long entertained serious doubts whether in an action for libel, slander or assault and battery, evidence of the wealth of the defendant was admissible, upon the question of damages. I had occasion several years ago, in *Blacksmith v. Fellows*, an action for an assault, to examine the question whether the evidence was admissible in such an action; and I came to the conclusion that it was not; and also that it was not admissible in actions to recover damages for libel or slander. *Blacksmith v. Fellows* presented other questions, upon which a new trial was granted, at a general term; my brethren expressing no opinion upon the question whether the admission of evidence of the wealth of Fellows was error. It was stated at the circuit, upon the trial of this cause, by the counsel, Mr. Martindale, that it was the practice, at the circuit, to admit evidence of the wealth of the defendant, in actions for libel and slander; and that such evidence had recently been admitted in the 7th district, after full argument. I permitted the evidence to be given. The question has now been fully and ably argued at the general term, and it has been carefully examined. In my opinion the pecuniary circumstances of the defendant, in an action for slander, or libel, are not involved in the issue, and evidence to show him rich or poor ought not to be received.

It cannot be necessary to state the general rules relating to damages in this class of cases—that the plaintiff is entitled to recover all the damages he has sustained, whether the defendant be rich or poor; that the amount of damages is in the sound discretion of the jury; and that they may give exemplary or vindictive damages, &c. The counsel for the plain-

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tiff has furnished an able brief, arguing at length that evidence of the wealth of the defendant is admissible, as some guide to a jury, in case they should conclude to give exemplary or vindictive damages. It is often argued that a small verdict will be no punishment to a man of wealth. This may or may not be so. Men of wealth are quite apt to value and appreciate property as highly as those in moderate circumstances. Such an argument is, in my opinion, speculation; and it will be dangerous to instruct a jury that they may measure the verdict by the ability to pay. The plaintiff is, I think, without authority in support of this position. None is produced from a court in bank in this state, and *Bennett v. Hyde*, (6 Conn. Rep. 24,) is not authority for the position, when properly understood. It is there said that it had been frequently adjudged, in that state, and that it might be considered as established law, that the plaintiff, in an action for slander, may prove the amount of the defendant's property, to aggravate the plaintiff's damages. That great wealth is generally attended with corresponding influence; and little influence is the usual concomitant of little property. That property may be, and often is, attended with the power of perpetuating great damage, and in the estimate of a jury becomes an interesting inquiry.

As I understand the learned judge, the question, so far as principle is concerned, hinges upon the assumption that wealth influences the rank in society of its possessor, and that the slander of a man of rank and influence is more injurious than the slander of one of less influence. It may be admitted that the slander of a man of high character and influence would be more destructive to the character of the party slandered than the slander of one without character and influence. Hence the character and standing in society of the defendant have long been admitted in evidence in this class of cases. But I am not satisfied that wealth is a necessary ingredient to constitute character, standing and influence in society. It may form an element in fixing character and influence, but not ne-

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cessarily. Why not limit the inquiry, then, to the question what are the character, standing and influence of the defendant in the society where the slander was uttered? I object to proving, as a separate item, that the defendant is a man of wealth, or great wealth, or how much he is worth. If the evidence is admitted simply for the purpose of showing the *influence* of the defendant, and hence the extent of injury to the plaintiff, it should be confined to the *time* when the slander was uttered. The defendant may, at that time, have been poor, and at the time of the trial rich, or *e converso*.

As I understand *Bennett v. Hyde*—and so I think, Mr. Greenleaf understood it—the evidence is admissible only for the purpose of ascertaining the defendant's rank and influence in society, and as a consequence, the extent of the injury to the plaintiff. The evidence is not admissible for the purpose of showing the ability of the defendant to pay, or for the purpose of assisting the jury in measuring out exemplary or vindictive damages; but it was admitted in Connecticut solely for the purpose of ascertaining the standing and influence of the plaintiff, with a view of enabling the jury to form some opinion as to the *actual damages* which the plaintiff had sustained. In the present case, the evidence was not offered or admitted for any such purpose, or with any such view. I am not, however, satisfied that such evidence, as a separate independent item, should be admitted for any purpose. Establish it as a rule, that the plaintiff may, in this action, prove the wealth of the defendant as an independent item of evidence in the cause, and such evidence will be used for quite a different purpose than simply to ascertain how much injury the plaintiff actually sustained in consequence of the character, standing and influence of the defendant, and juries will be invited and eloquently urged to punish the defendant by a large verdict which he can so easily pay.

Greenleaf, in his *Evidence*, (vol. 2, § 249,) says, as the result of the cases: "The jury are to inquire, not what the defendant can pay, but what the plaintiff ought to recover. But

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so far as the defendant's rank and influence in society and therefore the extent of the injury, are increased by his wealth, evidence of the fact is pertinent to the issue." He cites *Bennett v. Hyde*, and many other cases. I have looked into most of them. In two or three of them something is said of the reputed wealth of the defendant, in connection with his standing and influence in society. But it does not appear whether direct evidence of the wealth of the defendant was offered and given; or that any question was raised, touching such evidence.

In *Bennett v. Hyde*, Ch. J. Hosmer cites *Larned v. Buffington*, (3 *Mass. Rep.* 546,) as containing the same rule established in Connecticut. In that case the defendant proposed to prove, in mitigation of damages, the manner and condition of the plaintiff's life. The court say, "we are of the opinion that the plaintiff may give in evidence, to aggravate the damages, his own rank and condition in life, and also that the defendant may avail himself of such evidence, when it will have a legal tendency to mitigate the damages; because the injury which the plaintiff may sustain by the defamation may very much depend on his rank and condition in society." This is the rule referred to. It is, then, the rank and condition of life of both the parties that may be given in evidence, "because" in the further language of the court, "it is in issue, as the knowledge of it may be necessary to a just assessment of the damages, and because it is a fact, in its nature, of general notoriety." These extracts from the case referred to by Justice Hosmer, show what evidence may be given, and it is evidence of the rank, character and condition in life of the parties. And putting Greenleaf's construction upon the cases, including *Bennett v. Hyde*, "so far as the defendant's rank and influence in society, and therefore the extent of the injuries, are increased by his wealth, evidence of the fact is pertinent to the issue." My object has been to ascertain the extent and reason of the rule in *Bennett v. Hyde*, and also the authorities upon which it rests. And I find no adjudication, where the question has been distinctly raised, holding that the wealth

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of the defendant may be proved as an item to show his character, standing and influence in society.

That the general standing in society of either of the parties may be proved, I have no doubt. But I do not think that it is necessary or proper to prove to the jury the wealth or poverty of either of the parties. It is a question with which they have nothing so do, in estimating the damages. A plaintiff who has suffered from the slander of another is entitled, by way of damages, to full compensation for all the injury he has sustained, whether the defendant is rich or poor, and the jury may, if they think proper, add something by way of example.

It will be proper to refer to one or two of our own cases, not, I concede, in point in this case, but bearing upon the question I am discussing. In *Dain v. Wycoff*, (3 *Seld.* 191,) the action was for seduction. The plaintiff was permitted to prove that the defendant was a wealthy man. Judge Gardiner says: "The custom, at the circuit, has been to admit evidence of this character, but I have not been able to discover, in the elementary writers on evidence, authority for the practice." The case was decided on other grounds, and the other judges gave no opinion upon this question. In *Jones v. Buddington*, (4 *C. & P.* 589,) Alderson, B. says: "The plaintiff is entitled to as much damages as a jury think is a compensation for the injury he has sustained, and the amount of the defendant's property is not a question in the case." These were actions for seduction, and it may be said, are not applicable to a case of slander. I think they are, in principle, in point, provided the amount of the verdict is to be affected by the wealth of the defendant; but if the wealth of the defendant is shown simply as some evidence tending to show his rank, standing and influence in society, then I concede they are not in point. (See also 4 *Hill*, 292; 4 *Denio*, 461.)

The decision at the circuit was erroneous, and the judgment must be reversed.

[ORLEANS GENERAL TERM, September 13, 1858. *Grover, Marvin and Davis*, Justices.]

KELLOGG *vs.* J. R. OLMSTED and C. L. OLMSTED.

In a case simply between debtor and creditor, the debt being undisputed and due, and drawing interest, no valid agreement can be made, by parol, to postpone to a future day the payment of the debt. Yet it may be postponed by a new written contract.

A parol agreement between the payee of a promissory note and the makers, after the same becomes due, that in consideration that the makers will keep the principal sum specified in the note, until a future day mentioned, and pay the same with interest on that day, the payee will extend the time of payment of the principal until the day mentioned, is not valid, either upon the principles applicable to cases of forbearance to sue, or on the ground of accord and satisfaction.

A PPEAL by the defendant, from a judgment entered upon the decision and report of a referee. The action was upon a promissory note made by the defendants and one J. J. McPherson, by which they promised, one year from date, to pay Geo. R. D. Colvil or bearer \$600 with interest semi-annually. The note was dated Oct. 1855. It was transferred to the plaintiff after it was due. The semi-annual interest had been paid. This action was commenced Oct. 30, 1856. McPherson died after action commenced. He and Charles L. Olmsted signed the note, each as *surety*.

The defense set up in the answer was that on the 8th day of Oct. 1856, after the note became due and while Colvil, the payee, was the owner of the note, it was agreed between Colvil and the defendant John R. Olmsted, on behalf of the defendants, that in consideration that the defendants would keep the principal sum of the said note until the first day of April, 1857, and pay the same with interest on that day, he, Colvil, would extend the time of payment of the principal of the note until the 1st day of April, 1857; that the defendants assented to said proposition, and agreed to and with Colvil to keep the principal of the note until the 1st day of April, 1857, and to pay the same, with interest, on that day. Averment that the plaintiff had full knowledge of this agreement, and took the note subject to it. The defendants offered to prove the de-

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fense set forth in the answer, and the referee, upon objection, excluded the evidence, and the defendants excepted. Judgment was perfected, and the defendants appealed to the general term.

Bartow & Olmsted, for the appellants, cited 1 *Parsons on Cont.* 373, 4, 5; 2 *Kent's Com.* 585; *Trustees of Hamilton College v. Stewart*, 1 *Comst.* 581; *Comyn on Cont.* 27.

C. Danforth, for the plaintiff, cited *Miller v. Holbrook*, 1 *Wend.* 317; *Gibson v. Renne*, 19 *Wend.* 389; 1 *Chit. on Cont.* 33.

By the Court, MARVIN, J. The defendants' counsel claim that there was an agreement by which the defendants agreed to keep the principal of the note until the first day of April following, and to pay interest therefor. And they argue that such an agreement is valid, and founded upon a good consideration; that the defendants could not have tendered the money, or paid the debt, until the day named should arrive. In other words, that the payee of the note would be under no legal obligation to accept payment until the day named should arrive; and that this constituted a good consideration for the promise of the payee, Colvil, "to extend the time of payment of the principal of said note."

If this position is sound it must rest, I think, upon the principle applicable to accord and satisfaction. It cannot rest upon principles applicable to forbearance of payment. It is well settled that an agreement to postpone the day of payment of a part of a debt due, in consideration of the debtor's presently paying a portion of the debt, is not valid, and upon the ground that there is no consideration for such agreement. (*Miller v. Holbrook*, 1 *Wend.* 317. *Gibson v. Renne*, 19 *id.* 389.)

I am not aware that it has ever been suggested, before this case, that if the debtor promises to *retain* the money, and pay

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interest, this will constitute a good consideration for the promise to postpone the day of payment; and yet, in most of the cases, the debt postponed would be on interest. If the creditor indulges his debtor, without any agreement, and the debtor neglects to pay the note, the principal will continue to earn interest. The creditor will be in no better condition by making an agreement to forbear payment, than he would be without such an agreement, unless it be an object to him to continue the debt on interest and to compel the debtor to keep the money. In my opinion such an agreement would not be valid upon the principles applicable to forbearance to sue. The creditor is to derive no benefit beyond that which he would derive by simply neglecting to collect the debt; the debtor also neglecting to pay. He gets no additional security. His debt is not disputed. It is confessed; and there is nothing to compromise.

In my opinion, in a case simply between the debtor and creditor, the debt being undisputed and due, and drawing interest, no valid agreement can be made, by parol, to postpone to a future day the payment of the debt. The debtor's promising to pay interest will be no more than the law will compel him to do, without the promise. If he agrees to pay more than the interest, for the forbearance of the debt, the agreement will be void for usury. (*Crane v. Hubbell*, 7 Paige, 413. 1 Com. 274.) The parties may postpone the time of payment by making a new written contract. The note past due may be taken up, and another note given, payable at a future day, the payment of which cannot be enforced until the day of payment named shall arrive.

It would be an unsafe and dangerous rule, to hold that the time for the payment of a note may be enlarged upon such an agreement as is set forth in the answer in this case, to be proved by verbal evidence. It would open a door to controversies, frauds and false swearing.

I have said if the agreement can be upheld it must be upon the principles of accord and satisfaction. That is, all remedy

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upon the note was gone when the agreement was made, and the right of Colvil depended entirely upon the new agreement. It was not argued, and cannot be, successfully, that there was any accord and satisfaction. There are cases where the note of a third person is taken in satisfaction of a debt, and a defense may be set up by way of accord and satisfaction. (*Booth v. Smith*, 3 *Wend.* 66. 20 *John.* 76. 19 *Wend.* 390.) But there can be no accord and satisfaction when one does or agrees to do what by law he is bound to do.

I think the referee did not err, and the judgment should be affirmed.

[ORLEANS GENERAL TERM, September 13, 1858. *Grover, Marvin and Davis*, Justices.]

LYDIA ALLEN, by John P. Wood, her next friend, *vs.* HUGH R. COWAN, sheriff of Washington county, and JACOB ALLEN.

Where household furniture, belonging to A., was sold under a mortgage given by A. to his daughter, and was bid off by L., who went into the parlor with the plaintiff, (A.'s wife,) and pointed out to her several articles of furniture there, saying, "I give this property to you, and all that I have purchased here this day," but doing no act to deliver the property, or transfer the possession, and the plaintiff doing nothing to express her acceptance of the gift, or of the possession; and the property remained where it was, and continued to be used by A. and his family precisely as it had been used before the sale; *Held* that there was no valid gift of the property by L. to the plaintiff. Where A. executed to his daughter a mortgage upon his household furniture, to secure the payment of a debt alleged to be due, for money lent, but there was no immediate and continued change of possession of the property, the same remaining in the house of the mortgagor for more than two years, and being used by his family, during that period, in the same way it was used before the mortgage was executed; *Held* that as between a person claiming title to the property under the mortgage, and one representing a judgment creditor of the mortgagor, the circumstances called for *some evidence* that the mortgage was made in good faith, and without any intent to defraud the creditors of A.

And that if no such evidence was given, the conclusive statute presumption of

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fraud stood in the way of a recovery, by a person claiming the property through a purchaser at a sale under the mortgage, against a sheriff who had levied on the same by virtue of an execution against A.; and called upon the court to nonsuit the plaintiff.

Under such circumstances, until *some* evidence of good faith is given, the law adjudges the mortgage void as to creditors, and the jury has nothing to do with the question.

When *any* evidence is furnished, to affect this statute presumption, and from which a jury may lawfully find that such presumption is overcome, then, and not until then, must the case be submitted to the jury.

The evidence which the party claiming under the mortgage, in such a case, is called upon to give, must have reference to the consideration of the mortgage, and the motives of the parties in making it.

APPEAL from a judgment entered at a special term, denying a motion made by the plaintiff to set aside a nonsuit and for a new trial. The action was brought to recover the possession of certain articles of household furniture, which the plaintiff claimed to own, by virtue of a gift thereof from one Bryan J. Lawrence, who had bid the same off at a sale under a chattel mortgage executed by the defendant Jacob Allen, to his daughter, Mary N. Allen. The defendant Cowan justified the taking of the property, as sheriff of the county of Washington, by virtue of an execution against Jacob Allen, issued on a judgment recovered against said Allen in the supreme court, by J. B. Wilkinson, for \$535.97. And the defendant Cowan alleged in his answer that at the time he levied upon the goods the same were in the possession of Jacob Allen, and were owned by him. The plaintiff was nonsuited, on the trial.

Hughes & Northup, for the appellant.

U. G. Paris, for the respondent.

By the Court, ROSEKRANS, J. On the 15th of December, 1855, the defendant Jacob Allen, who is the husband of the plaintiff, executed to his daughter, Mary N. Allen, a chattel mortgage upon all his household furniture, except such as was exempt from sale under execution, conditioned to pay \$680.25,

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(which the mortgage stated was due from the mortgagor to the mortgagee, *for money lent by her to her father*,) with interest, on the 15th March, 1856. The mortgage was duly filed, but the property remained in the possession of the mortgagor. On the 20th of March, 1856, the property was sold under the mortgage, and was bid off by Bryan J. Lawrence, the nephew of the mortgagor. The property mortgaged to the daughter had been used by the mortgagor for several years, and after the sale on the mortgage it was not removed, but continued to be used as it had been used before the sale. After Lawrence purchased the property he went into the parlor with the plaintiff, his aunt, and pointed out to her the sofa, piano, chairs, stands, foot-stools and property there, and said to her, "I give you this property and all I have purchased to-day." This was all that was said or done to constitute a gift of the property to the plaintiff. She claimed the property, under this gift. It remained in the house of Jacob Allen, and was used afterwards as before, until the defendant, in October, 1856, levied upon it by virtue of an execution issued upon a judgment against Jacob Allen, and until the defendant, in January, 1857, was about to sell the property, when the plaintiff replevied it. I ruled at the circuit that there was no sufficient evidence of a valid gift of the property by Lawrence to the plaintiff, and the plaintiff excepted to this ruling.

To constitute a valid gift it is necessary that there should be a delivery of the property to the donee, or to some person for the donee's use. "There must be a delivery of possession. The contract must be executed. The thing given must be put into the hands of the donee, or placed within his power by delivery of the means of obtaining it." (*Harris v. Clark*, 3 Comst. 100. *Hunter v. Hunter*, 19 Barb, 635, 6.) "If the gift does not take effect by delivery of immediate possession. it is then not properly a gift." (2 Bl. Com. 441.) "There must be a transfer made with an intention of passing the title and delivering the possession of the thing given, and *it must be accepted by the donee*." (1 Bouv. L. Dict. tit. Gift, § 3.

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1 *Madd. Ch.* 176.) “There must be the mutual consent and concurrent will of both parties.” (2 *Kent’s Com.* 554, 8th ed.) “Delivery in this, as in every other case, must be according to the nature of the thing. It must be an *actual delivery so far as the subject is capable of delivery*. And when the gift is perfect by delivery and *acceptance*, it is then irrevocable. If the subject of the gift be not capable of actual delivery, there must be something equivalent to it.” (2 *Kent’s Com.* 555, 6.) “Delivery in both kinds of gifts, (*inter vivos* and *causa mortis*,) is equally requisite on grounds of public policy and convenience, and to prevent mistake and imposition.” (*Noble v. Smith*, 2 *John.* 56.) And no distinction is made as to the nature of the delivery of the subject of the gift in the two cases. The law requires the delivery as evidence of the gift by the donor, and acceptance of it by the donee. The authorities uniformly hold that where the subject of the gift is capable of actual delivery, of manual or corporal tradition or acceptance, in order to make the gift perfect such delivery should be made; mere words, without any acts, in such a case will not answer. (*Huntington v. Gilmore*, 14 *Barb.* 243.) They do not change the possession. The rule of the common law requiring a delivery and acceptance of the subject of the gift, is quite as imperative as that of the statute of frauds requiring the delivery and acceptance of goods sold in the absence of a memorandum of the contract and of the payment of a part of the purchase money; and the reasons for establishing and adhering to the rule in the former case are quite as forcible as those which induced the enactment of the statute of frauds, especially in cases where the value of the gift is more than \$50. The court of appeals, in the case of *Shindler v. Houston*, (1 *Comst.* 261,) held that to constitute a delivery and acceptance of goods, such as the statute requires, something more than mere words was necessary; that superadded to the language of the contract there must be some act of the parties amounting to a transfer of the *possession* and an acceptance thereof by the buyer, and that the case of cumbrous articles was not an exception. A

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symbolical delivery will answer under the statute, where the articles are ponderous and incapable of being handed over from one to another. (*Chaplin v. Rogers*, 1 *East*, 194.) There it was held that the delivery, to the vendee, of the key of the warehouse where the goods sold were deposited, was equivalent to an actual delivery. And in *Smith v. Smith*, (1 *Str.* 955,) it was ruled that the delivery of the key of the room containing furniture was such a delivery of possession of the furniture as to render the gift *causa mortis* valid. (2 *Kent's Com.* 556.) Applying these rules to the case under consideration, it is clear that the ruling at the circuit was correct. There was no act of Lawrence transferring the possession of the furniture to the plaintiff, nor any act of the plaintiff accepting the possession. Lawrence merely went into the parlor and *pointed out* to the plaintiff several articles of furniture there, and said, "I give this property to you, and all that I have purchased here this day." A gift is a contract, and these are only the words of the contract on the donor's part. There was no delivery of the property, either actual or symbolical. The whole transaction consisted of mere words on his part; nor did Mrs. Allen at that time, either say or do any thing in relation to the property, or the donation. She did not even by her thanks express a willingness to accept the gift. And as to any change of the possession, the proof shows that the property remained in precisely the same situation, and continued to be used after the sale upon the mortgage as it had been for several years before. The plaintiff furnished this evidence, and it was uncontradicted. The furniture was in Jacob Allen's house, and was used and enjoyed by him and his wife and family under him. Not an article was misplaced, even temporarily. There was no delivery, either actual or symbolical, of a single article of the property. If the possession was that of Jacob Allen before the sale, it remained his afterwards; (*Otis v. Sill*, 8 *Barb.* 122, 3;) unless mere words constitute a change of possession, and that we have seen is not sufficient. The language of Wright, J., in *Shindler v. Houston*, (1 *Comst.* 273,)

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by substituting the words "donor" and "donee" for the words "seller" and "buyer," will state the correct rule as to what is necessary to constitute a gift of chattels. "There must be not only a delivery by the donor, but an ultimate acceptance of the possession of the goods by the donee, and this delivery and acceptance can only be evinced by unequivocal acts independent of the words of the contract." Upon the trial the plaintiff proposed to prove that after the sale upon the chattel mortgage, she claimed the property as her own. This evidence was excluded, and I think properly. It related to a time subsequent to the gift. Even had the claim been made at the time of the pretended gift, in the absence of *any act* on the part of Mrs. Allen, it would have been inadmissible. It would not have constituted an acceptance of the gift, which could only have been made by acts. It would have amounted to a naked declaration, unaccompanied by any act which it could explain, and therefore would not have been admissible as part of the *res gestæ*. Without *an act* accompanying the claim, under such circumstances there was nothing which the law regards as *res gestæ*. It was equally a naked declaration, and no part of the *res gestæ*, if made at any time before the levy by the defendant. The property continued till then to be used as it had been before the mortgage sale, and the plaintiff had no possession which her claim could explain. (*Otis v. Sill, sup.*) And besides, without proof of a perfect gift *inter vivos*, by delivery and acceptance of possession of the property at the time a gift is made, when donor and donee are present, no subsequent obtaining of possession, or claim of ownership of it by the donee, will in my judgment be sufficient to perfect the gift. (*Miller v. Jeffries, 4 Gratt. 472.*) The minds of the parties, when both are present, should meet at the time of the proposed gift, as they are required to meet in case of a sale. If the subject of the gift is delivered by the donor to a third person for the donee's use, in his absence, the acceptance of the donee must be by some act done when knowledge of the delivery and purpose of it is communicated to him. If the gift is

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by deed, expressing a valuable consideration delivered to the donee, or to some person for his use, as in the case of *Hunter v. Hunter*, (19 Barb. 632, 638,) the gift is perfect and the title passes upon the delivery of the deed. The donor, and all claiming under him, are estopped from denying the consideration, to the extent of invalidating the deed. Such an instrument operates as a grant, and the title remains vested in the donee until he disclaims, which he may do at any time before he has accepted the grant.

I also ruled at the circuit that there was no sufficient evidence of consideration of the mortgage from Jacob Allen to his daughter, under which Lawrence purchased the property in question. There was no immediate and continued change of possession of the property covered by the mortgage. As before stated, it continued in the house of the mortgagor from the date of the mortgage until January, 1857, and was used during this period as it was before the mortgage was given. The statute declares that a mortgage of chattels, unless accompanied by an immediate delivery and followed by a continued change of possession of the mortgaged chattels, shall be presumed to be fraudulent and void as against the creditors of the mortgagor, and shall be conclusive evidence of fraud, unless it be made to appear on the part of the persons claiming under the mortgage that it was made in good faith and without any intent to defraud such creditors. The plaintiff claimed title to the chattels under the mortgage. The defendant represented a judgment creditor of the mortgagor. The circumstances of the case called for *some evidence* that the mortgage was made in good faith and without any intent to defraud the creditors of the mortgagor. If no such evidence was given, the conclusive statute presumption of fraud stood in the way of the plaintiff's recovery, and called upon the court to nonsuit the plaintiffs. Until *some evidence* of good faith was given, the law adjudged the mortgage void as to creditors, and the jury had nothing to do with the question. When any evidence is furnished, to affect this statute presumption, and from which

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a jury may lawfully find that such presumption is overcome, then and not until then, must the case be submitted to the jury. The evidence which the party claiming under the mortgage is called upon to give when there is no change of possession of the mortgaged chattels, must have reference to the consideration of the mortgage and the motives of the parties in making it. (*Edgell v. Hart*, 5 *Selden*, 218, *Denio*, J.) "The law presumes under such circumstances that the mortgage was without consideration, or without a sufficient one, and that there was some secret trust or an intent to defraud creditors or subsequent bona fide purchasers." (*Thompson v. Blanchard*, 4 *Comst*, 307, *Jewett*, J.) The maxim that "fraud is not to be presumed but must be proved," is reversed in such cases. An acknowledgment of consideration in the mortgage, which would be conclusive between the parties to it and estop them from denying the effect of the instrument; (*Grout v. Townsend*, 2 *Denio*, 336;) or which in a deed or mortgage of real estate would be prima facie evidence of consideration to constitute the grantee or mortgagee a bona fide purchaser under the recording acts, (*Wood v. Chapin*, 3 *Kern*. 509, 516,) is of no force whatever in establishing the consideration or good faith of the mortgagee as against the creditors of the mortgagor or subsequent bona fide purchasers. If the admissions of the parties to the mortgage that there was a valuable consideration for it, were held to be sufficient to overcome the statute presumption of fraud, the statute would be a delusion and dead letter. The law does not contain any such absurdity. The parties may manufacture accounts stated and settled, and promissory notes, which as between themselves would be evidence of settlements and evidence of money lent, and evidence of debt, and prima facie evidence of consideration without any being stated, or sealed acknowledgments of consideration, conclusive as between the parties themselves, and either or all of these would be ineffectual in the absence of other proof of consideration, as against creditors and subsequent bona fide purchasers, to remove the conclusive presumption of

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fraud which the statute raises. There must be evidence dehors the instrument. (*Baskins v. Shannon*, (3 Comst. 310.) The proof of consideration must go beyond a mere paper acknowledgment of it, such as would be binding between the parties. (*Hanford v. Archer*, 4 Hill, 272. *Tift v. Barton*, 4 Denio, 174, 5.) And proof of general or particular indebtedness from the mortgagor to the mortgagee is insufficient. It must be shown to be connected with the mortgage, and that the mortgage was given to secure the indebtedness proved. (*Baskins v. Shannon*, *supra*.)

These rules are founded upon the same reasons, and arise from the same considerations, as those which induced the enactment requiring the statement of facts out of which an indebtedness arises upon which judgments are confessed without action, and the language of the courts in relation to such statements are applicable to such cases as the one under consideration. (See *Chappel v. Chappel*, 2 Kern. R. 215 to 222; *Johnson v. Fellerman*, 13 How. Pr. R. 22, *Clerke, J.*) In this case the mortgage recites that the mortgagor is indebted to the mortgagee in the sum of \$263.25, for money lent by the mortgagee to the mortgagor, and that the mortgage is given for the purpose of securing the said debt and interest. The plaintiff gave no evidence that Mary Allen lent her father the sum of money mentioned in the mortgage, except the admission of the father contained in the mortgage, and that she held a note signed by him. The note, as between the parties to it, was presumptive evidence of a debt, but as to the creditors of the mortgagor in whose favor the statute declared the mortgage fraudulent, and without consideration, it furnished no evidence of money lent or other consideration for the mortgage. The plaintiff endeavored to show a consideration for the note, but could only prove her own declarations, and those of her husband the mortgagor, that the latter had received funds from the executors of the mortgagee's grandfather for her benefit. The fact that such money was received for that purpose, or the amount received, was not proved, and if it had been

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proved it would have contradicted the mortgage, as to the nature of the indebtedness which the mortgage was given to secure, and this the mortgagee or those claiming under her could not do. (*Coon v. Knap*, 4 *Seld.* 402, and *auth. cited* 2 *Cowen & Hill's Notes*, 1451, 1453, 1441. 1 *John.* 139.)

In *Tift v. Barton*, (4 *Denio*, 171,) the action was against the sheriff by the daughter of the defendant in the execution, for taking goods, claimed by the daughter, under a bill of sale from her father. The bill of sale stated that \$250 of the consideration was for labor and services of the daughter for ten years for her father, and that \$35 of it was for borrowed money. No evidence was given to show that she had paid any part of the consideration mentioned in the bill of sale and Bronson J. said: "the plaintiff makes title to a part of the goods by bill of sale from her father, without any change of possession, and without showing that any consideration was paid. All the cases agree that such a sale is fraudulent and void as against the creditors of the vendor, *and there is nothing to be left to the jury.* The law declares the sale void. It is only on proof of a good consideration that the cause goes to the jury on the question of fraud in fact. Neither the recital of a consideration in the bill of sale, nor what the parties said on that subject at the time the instrument was executed, was evidence against creditors. They are strangers to the transaction. There was not a particle of proof that the plaintiff paid any consideration for the property, and the jury should have been instructed that the sale was a fraud upon creditors and as against them utterly void."

The plaintiff having furnished no evidence, such as the law requires, to show that the mortgage under which she claimed title to the property was founded upon any valuable consideration, there was no question for the jury, and the nonsuit was properly granted.

Judgment affirmed.

[FRANKLIN GENERAL TERM, September 14, 1858. C. L. Allen, James, Rosekrans and Potter, Justices.]

HURLEY *vs.* VAN WAGNER.

An action will lie to recover compensation for services rendered to another, under a contract, in putting up and taking down a tent, used by the employer as a place for holding public meetings of the political friends of a particular candidate for the presidency, during the canvass preceding a presidential election.

The case of *Jackson v. Walker*, (5 *Hill*, 27,) should not be extended beyond the circumstances out of which it arose.

APPEAL from a judgment of the county court of Dutchess county. The action was brought to recover the value of the services of one James Murgatroyd, performed by him for the defendant, and for disbursements. The claim had been duly assigned to the plaintiff, by Murgatroyd. The action was tried before a justice of the peace. From the evidence given on the trial, it appeared that during the summer and a part of the fall of 1856, the defendant was traveling about the country with a large tent, engaged in delivering lectures in behalf of the republican party, and in favor of the election of John C. Fremont to the office of president of the United States, and in giving political concerts. That Murgatroyd was employed by the defendant at \$15 per month, and the defendant was to furnish him with board and lodging. Murgatroyd, the only witness sworn upon the trial, testified, "that the bargain between himself and defendant was made at Newburgh. Defendant hired me to help take tent down and put it up. The tent was used for political lectures. All the work I did was taking down and putting up the tent, and putting it on the wagon, and going with him. I thought, when I hired to him, that the work I was to do was to go with him in the political campaign and assist him in that campaign. The lectures were in favor of the election of Fremont to the presidency. I hired to work for him from June 9th to Nov. 4th. My contract was to work through the whole campaign. Van Wagner told me if I could not stay with him through the whole campaign, he did not want me. I quit before my time was out, because he had no more work for me. He trav-

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eled in this state and the state of Maine. Van Wagner took up some collections at the meetings. He came back here about two weeks before the election. The collections were all taken up at the political meetings and political concerts." He commenced work June 9th, 1856, and continued in defendant's service four months and two weeks, and expended money for his board and lodging while engaged in his work, which defendant had not paid. The amount due the plaintiff was not contested. The only defense made was, that the plaintiff was not entitled to recover by reason of the provisions of the act "to preserve the purity of elections."

The justice rendered a judgment in favor of the plaintiff for \$41.75, the balance due on the account, besides costs; and the defendant appealed to the county court. That court affirmed the judgment.

Doty & Storrs, for the appellant. The contract is made illegal by statute, and is therefore void, and the plaintiff cannot recover. (1 R. S. 363, 4th ed.) The statute, (sub. 5, § 6,) expressly forbids any person paying money, except for printing, and the circulation of votes, handbills, and other papers. The act done in this case is not among the exceptions, and is therefore forbidden, and the doing of which is made a crime punishable with fine and imprisonment. The assignor undertook to do an act which, although he had a perfect right to do, yet so far as the law is concerned he must do voluntarily. The courts will not aid him in enforcing a contract for such a purpose. The act being forbidden as to one party must be so as to both, necessarily. It matters not how "*moral or honorable*" the assignor may have been, neither to what party he belonged; if he has contracted to do that which the law declares a man shall not pay money for, then he must bear the loss, if any there be. He cannot invoke the aid of a court to help him out of his difficulty, by lightly construing a wise and necessary statute. In the language of Judge Bronson, in the case of *Jackson v. Walker*: "*The parties intended to accomplish the very thing*

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which the statute declares to be illegal. No man can wink so hard as not to see it," &c. The case in the 5th of Hill has more equity to support it than this. It is a stronger case. But in that case Judge Bronson said: "I will not discuss the policy of the law. The legislature have said the thing shall not be done, and that is enough." (Jackson v. Walker, 5 Hill, 27.)

L. B. Sackett, for the plaintiff. The defendant claims that his contract to pay for the services mentioned in the complaint is illegal. That it was made in violation of the statute "to preserve the purity of elections." The contract as it appears in evidence is but the ordinary one for labor and services. It does not appear that Murgatroyd was hired for the purpose of promoting the election of any one, or that he did any thing with that object. His contract, therefore, is legal. In the case of *Jackson v. Walker*, (5 Hill, 27,) Walker agreed to keep open his log cabin for the use of the whig party until after the election, and it was kept open to promote the election of General Harrison and members of congress; this intent was set forth in the complaint and proved upon the trial, so that the payment of the \$1,000 would have been a direct contribution for that object.

II. The object of the statute is to preserve the purity of the elective franchise. It is not applicable to a case like this, where a man employs a servant or waiter for his own personal ease or convenience. There is no necessary connection between the work to be performed and the election of any one. (*See 1 Bos. & Pul. 587; 6 Curtis U. S. 587.*)

III. There being evidence from which the justice might have inferred that the defendant's speeches were delivered for the profits which he received from the collections taken up at the meetings, rather than for the purpose of promoting the election of any one, the finding of the justice should not be disturbed by an appellate court.

IV. The presumption of law is in favor of the legality of a

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contract, and therefore if it be reasonably susceptible of two meanings—one legal and the other not—that interpretation should be put upon it which will support and give it operation. (*Chitty on Cont.* 571.)

By the Court, BROWN, J. This court decided in *Jackson v. Walker*, (5 *Hill*, 27,) that a contract to pay for the use of a log cabin to be used, and which was used, during an election canvass, to promote the success of a particular candidate or ticket, was within the prohibitions of the act in regard to penalties for misconduct at elections, (1 *R. S.* 362, 4th ed.,) and could not be enforced. The decision must be regarded as the law of this court, but it should not be extended beyond the circumstances out of which it arose; for, notwithstanding the acknowledged ability of the judge who delivered the opinion, it is hardly possible to reconcile it with the spirit or the letter of the statute of which it is an exposition. The present action is not brought to recover the rent of a building or room used for the purpose of promoting the election of a particular candidate or ticket. It is brought to recover compensation for services rendered by one James Murgatroyd, the plaintiff's assignor, to the defendant in putting up and taking down a large tent used by him as a place of public meeting for the political friends of John C. Fremont, during the election of 1856. The services or consideration for the defendant's promise is thus one remove further from the election than the consideration for the promise in the case of *Jackson v. Walker*. There must be a limitation of the various cases to which the statute might be supposed to apply; for it would be absurd, I think, to say that a promise to pay for any service, or for any article furnished, such as room rent, board, carriage hire, rail road or steam boat fare, which might indirectly tend to promote the election of a particular candidate, is forbidden by the statute.

Section 6 of the act referred to declares it to be unlawful for any candidate for an elective office, with intent to promote

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his election, or for any other person with intent to promote the election of any such candidate, 1. To provide or furnish entertainment at his expense, to any meeting of electors previous to or during the election at which he shall be a candidate; or 2. To pay for, or procure or engage to pay for, any such entertainment; or 3. To furnish any money or other property to any person for the purpose of being expended in procuring the attendance of voters at the polls; or 4. To engage to pay any money, or deliver any property, or otherwise compensate any person for procuring the attendance of voters at the polls: or, 5. To contribute money for any other purpose intended to promote an election of any particular person or ticket, except for defraying the expenses of printing and the circulation of votes, handbills and other papers previous to any such election." It is not claimed or thought that the money to be paid for the services rendered by Murgatroyd, in putting up and taking down the defendant's tent, falls within either of the four first enumerated cases, but it is thought to be within the prohibition of the fifth enumerated class. According to the construction claimed by the defendant, money paid for services rendered, goods or any thing else furnished for a purpose not mentioned under either of the four first heads and not within the exception of the 5th, and which may tend to promote the election of a particular person or ticket, is a contribution of money within the meaning of the act. A person who pays money for his board, or rail road or steam boat fare while going to or from a political meeting; or who pays for the use of a room for such meetings, or for the lights or attendance thereat, in one sense contributes money to promote the election of a particular ticket or candidate. But is it a contribution of money in the sense intended by the act? Did the legislature intend to prohibit, and punish as a misdemeanor, every expenditure of money which might indirectly promote, or be intended to promote, the election of particular candidates? Public meetings, large assemblies of the people, constant and almost universal intercommunication, one with another, and journeys from one part of

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the country to another, are the usual and customary means by which the election of particular candidates is secured, and they necessarily involve the expenditure of large sums of money, which may be said to be contributed. Is this the evil that the act was designed to suppress? If it was, it may be safely said to have utterly failed of its object; for during the twenty-nine years it has been upon the statute book, hardly an attempt has been made to enforce it; and the evil practice, if it be one, has gone on and gained additional strength with each additional year.

I therefore infer that these are not the contributions in money forbidden by the act. That its provisions were designed to prohibit contributions in money to a common fund to be expended for election purposes, and which might be employed by unscrupulous men to demoralize and corrupt the electors and to defeat the public will. If the payment of a sum of money for the use of a room in which to hold a public meeting for political objects, or for the lights used thereat, or for the attendance of a person to prepare such room and keep it in proper order, is a contribution of money to promote an election, within the meaning of the statute, so is the money a man may expend upon himself in the payment of tavern bills and the expenses of transportation, in going to and returning from such meetings, equally a contribution of money to promote an election; because all such expenditures tend to the same result, and the money is disbursed for the same object, and that is to aid in the election of a particular candidate or ticket. It is not possible to discriminate between them. So that to adopt the construction claimed, is to impute to those who framed the law the most absurd intentions; or to give it an effect which they could not have contemplated. If, on the other hand, the act be interpreted to prohibit contributions in money to a common fund for the uses indicated, then it will have a rational and sensible construction, will command the respect due to sensible and practical legislation, and its effect will be to diminish, and perhaps in the progress of time, to

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extinguish a practice which obtains to a greater or lesser extent during the progress of an election canvass, and which all unite in condemning as a great evil. This construction conforms to the primary and popular signification of the word contribute which is, to give in common with others to a common fund to be employed and expended for a common purpose. It will also harmonize with the spirit of the law, which is not to obstruct the diffusion of knowledge, but to suppress a positive evil. Money contributed "for defraying the expenses of printing and the circulation of votes, handbills and other papers," is expressly excepted from the prohibition of the act. And this exception affords a clear indication that it was not intended to interfere with public examination and discussion, or impede in any manner the distribution of printed matter, or the diffusion of knowledge. Funds contributed by the members of a political party upon the eve of an election are quite likely to be devoted to questionable and reprehensible uses; to purposes of demoralization and corruption, and thus to defeat a free and fair expression of the popular will. The contribution and collection of such funds, for such purposes, justly deserve the censure and condemnation of a wise and virtuous community. Buildings, tents or other structures, however, appropriated to the uses of political meetings, are not obnoxious to any such objection. Dedicated and used as forums of debate and public discussion where the policy of the government, its legislative and administrative action, and other kindred subjects are argued and examined, they can hardly be misappropriated. And although the argument and discussion may be exclusively partizan, and exhibit but a single side of a public measure, it would be vain to deny that they do not awaken and stimulate inquiry, and diffuse to some extent the knowledge and instruction essential to an enlightened public judgment. In a government of opinion, whatever tends to this result, if otherwise innocent, deserves encouragement and commendation. And the legislature are not to be supposed to have intended by a penal statute to interfere with this lib-

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erty of free discussion, unless its language should admit of no other sensible construction.

The judgment of the county court should be affirmed.

[ORANGE GENERAL TERM, September 14, 1858. *S. B. Strong, Emott and Brown*, Justices.]

 COURTNEY vs. THE NEW YORK CITY INSURANCE COMPANY.

Whenever a loss of property insured occurs, and the insurers have notice, and are furnished with the preliminary proofs required by the conditions of insurance, the amount of the loss becomes, by force of the contract, a debt, payable to the insured presently or at the time appointed in the policy. And whenever the right of property in the debt thus attaches and becomes perfect, all the incidents of property attach, also, including the power of sale and disposition.

Hence a condition, annexed to a policy of insurance and forming a part of the contract, the purpose of which is to prevent a sale and assignment of the debt by the assured, after the same has accrued and the right to it has become perfect, is void, *it seems*; and cannot be enforced, for the reason that it is repugnant to the principal object of the contract.

The reasoning and conclusion of the court upon this point, in *Goit v. The National Protection Ins. Co.*, (25 Barb. 189,) approved.

A condition declaring that policies subscribed by the insurers shall not be assignable before or after a loss, without their consent, indorsed thereon; and that in case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the insurers in virtue of such policy shall thenceforth cease, is to be construed to mean their liability as insurers, for losses to accrue thereafter, and not for losses which have already accrued.

If, after a loss has occurred, the assured, by deed of assignment, sells, assigns and transfers to another the debt, demand and right of action which have accrued to him in consequence of the loss by fire, the policy, and the contract to insure in future, will not pass by the assignment; but the right of action for the debt or demand will pass to the assignee, who may sue thereon.

A PPEAL from a judgment entered upon the report of a referee. The action was brought to recover the amount of a policy of insurance for \$650, effected June 1, 1854, upon

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the contents of a shop and dwelling of Michael McNamara, in Brooklyn, on which a total loss was claimed to have happened on the 1st of September, 1854. On the 31st day of May, 1855, McNamara executed, under his hand and seal, the following assignment to the plaintiff: "Know all men by these presents, that I, Michael McNamara, for and in consideration of the sum of \$500, to me in hand paid by Thomas Courtney, of the city of Brooklyn, the receipt whereof is hereby acknowledged, do hereby sell, assign, transfer, and set over unto the said Thomas Courtney all debts, dues, claims, demands, actions and rights of action which I have, or which belong or accrue to me against and from the New York City Insurance Company, growing out of loss and damage by fire of the property and premises described in Policy No. 1135, issued by said company; or growing out of any other matter or thing whatsoever. To have and to hold all and singular the premises hereby assigned to the said Thomas Courtney, his executors and administrators and assigns for ever."

Under and by virtue of this assignment, the plaintiff claimed to recover \$650, the whole amount insured, with interest. The defendants, by their answer, alleged, among other defenses not necessary to mention, that the policy, by express condition, was not assignable, either before or after loss, and that the assignment to the plaintiff rendered the policy void.

The referee reported in favor of the plaintiff for the whole amount claimed; and judgment was entered upon his report, for the amount, with costs, and the defendants appealed.

A. K. Hadley, for the appellants.

D. P. Barnard, for the respondent.

By the Court, BROWN, J. The contract of insurance was between the New York City Insurance Company and Michael McNamara. The loss by fire occurred on the 1st of September, 1854, and on the 8th of the same month the defendants

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were served with notice and with the preliminary proofs required by the 8th condition annexed to the policy. On the 31st day of May, 1855, after the service of the preliminary proofs of the loss, and after McNamara's right to the amount of the loss had accrued and become perfect, he assigned the claim or demand to the plaintiff by deed duly executed, of that date. Amongst the conditions annexed to the policy, and which are made a part of the contract, is one in the following words, numbered 4: "Policies of assurance subscribed by this company shall not be assignable before or after a loss, without the consent of the company expressed by indorsement made thereon. In case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of such company in virtue of such policy shall thenceforth cease," &c.

Whenever the loss occurs and the company have notice and are furnished with the preliminary proofs required by the conditions, the amount of the loss becomes, by force of the contract, a debt payable to the insured presently or at the time appointed in the policy. If the purpose of the 4th condition, or one of its purposes, is to prevent a sale and assignment of the debt after it had accrued and the right to it become perfect, I very much doubt whether such a condition is valid or can be enforced, for the reason that it is repugnant to the principal object of the contract. Whenever the right of property in the debt or damages attaches and becomes perfect, all the incidents of property attach also, including the power of sale and disposition. Now this power of sale and disposition is inseparable from the absolute right of property, and any condition of the kind attached to the sale of real or personal estate, when there is no reverter or reversionary estate in the vendor, is repugnant and absolutely void. (1 *Bac. Abr.* 646. 4 *Kent's Com.* 131. *Bradley v. Peixoto*, 3 *Ves.* 324.)

The effect of such a condition is quite obvious, whatever may have been the motive which made it a part of the policy. It is not to define, ascertain and preserve the rights of the

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parties, to avoid or terminate controversies and promote the ends of justice. It evidently contemplates nothing short of resistance and litigation, and thus essays, in advance, to choose its adversary. It is a positive impediment in the way of the assured, for it forbids him to sell, assign or hypothecate his claim or to realize a dollar towards the reparation of his loss and the renovation of his property, except at the pleasure of the company, or the worse alternative of a protracted and costly controversy. It puts it in the power of the insurer to prescribe terms of adjustment in disregard of the rights of its weaker adversary. The business of insurance is a most commendable and useful pursuit, fruitful of the happiest and most beneficial results, when conducted with integrity and good faith, and when losses honestly and innocently sustained are promptly liquidated by a ready execution of its obligations. But when they are repudiated or evaded, when just claims are answered by doubts and delays, and technical objections—founded perhaps upon some informality in the preliminary proofs, or as in this case upon some of the numerous conditions annexed to the contract—and finally by a flat refusal to pay, and a litigation unscrupulous and protracted, then it becomes a substantial oppression, and a calamity more grievous than the conflagration in all its fury. I do not think it necessary to determine this question, however. If it were, I should most readily adopt the reasoning and conclusion of Mr. Justice Allen, in *Goit v. The National Protection Insurance Company*, (25 Barb. 189,) published since the argument. The right of the plaintiff to sustain this action may, I think, be safely placed upon another ground.

Conditions of this kind are to be construed strictly; for they are manifestly in restraint of the free use and enjoyment of the rights of the assured under the contract, and are among the number of those almost innumerable conditions, usually inserted in contracts of this kind for the benefit of the insurers, and which not unfrequently escape the notice of the assured at the time of making the contract. It is the policy of

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insurance that is not assignable either before or after a loss, without the consent of the insurer. And in case of such assignment without consent, the liability of the company in virtue of such policy shall thenceforth cease. Not that its obligation to pay a debt which has already accrued shall be discharged and extinguished, but that the contract of insurance and of future liability shall cease. The language of the condition can have full effect and receive a sensible construction without destroying or impairing the right to recover a debt already accrued. And that is to regard the language as referring to the future liability of the company and its obligation to make good losses to accrue thereafter. The liability of the company to the holder of the policy is of two kinds, entirely different, and capable of separation; continued liability as assurers, and liability to pay damages which have accrued, and the right to which have become perfect. In the event of a partial loss, the policy does not cease. The obligation to pay such loss as has occurred exists at the same time with an obligation to make good any loss to be sustained thereafter, qualified of course by the amount of the insurance effected. In the event of a partial loss the damages which have accrued may be assigned to a third person, while the policy may still be held by the insured as security for future losses. The two kinds of liability are clearly distinguishable and severable. Upon looking at the deed of assignment it will be seen that the subject of it is not the policy of insurance, but the debt, demand and right of action which had accrued to the assignor in consequence of the loss by fire. The policy, and the contract to insure in future, did not pass by the assignment, but remained in its original condition.

I am therefore of opinion that the words "the liability of the company in virtue of such policy shall thenceforth cease," must be construed to mean its liability as an insurer for losses to accrue thereafter, and not for losses which have already accrued; and consequently the judgment should be affirmed.

OLIVIA PHELPS, sole acting executrix of Anson G. Phelps deceased, *vs.* ANSON G. PHELPS, jun. and others.

A testator, by the first section of his will, fully authorized and empowered his executors "or such one or more of them as may prove this my will, and the survivors and survivor of them, to sell and convert into money all my estate, real and personal whatsoever, and wheresoever, (except my present homestead and lands hereinafter devised to my wife,) and either at public or private sale, and upon such terms as they may think most conducive to the interest of my estate; and to make, execute and deliver good and sufficient deeds and conveyances therefor, to the purchasers thereof." It appearing, from the whole will, to have been the intention of the testator to have the real estate converted into money; and the most important purposes and provisions of the will appearing to call for such conversion, and to be incapable of execution without it; *it was held* that in construing and giving effect to the will, the power to sell must be considered as having been exercised, by the executors, and the real estate as converted into money.

Although there was no express direction, in the will, to sell, yet as the execution of the power to sell was not made expressly to depend on the will of the executors, it was therefore imperative. INGRAHAM, J. dissented.

The testator, by the 9th clause of his will, gave and bequeathed to each of his children, who should be living at the end of ten years after his decease, the sum of \$100,000, provided his son A. G. or his son-in-law D. should either of them be living; but in case they both should die before that time, then he gave \$100,000 to each of his children, who should be living at the death of the survivor of them. By other clauses of the will legacies were given to various persons, and to religious societies, payable in ten annual installments, commencing in three, five, and seven years. By the 20th clause, the testator declared that after paying and satisfying or providing for the payment of the legacies and bequests, in full, as to all the rest, residue and remainder of his estate, he gave, devised and bequeathed the same to his children and grandchildren, as follows: he ordered and directed the same to be divided into as many shares as he should have children and grandchildren living at the end of ten years after his decease; provided A. G. or D. should either of them be living at that time. But if, before the expiration of ten years from his death, A. G. and D. should both die, then at the decease of the survivor of them, he ordered and directed his said residuary estate to be divided into as many shares as he should have children and grandchildren living at the time of the decease of such survivor; it being his intention that each child and grandchild should be placed upon an equal footing, as to the said residue, and each child and grandchild receive one equal share of his residuary estate, upon such division, as soon thereafter as could conveniently be done. By the 21st clause, the testator directed that in case his wife should die before the division of his residuary estate, the fund re-

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served by the executors to secure an annuity to her should fall into the bulk of his estate, and form a part of such residue; but in case she should live beyond that period, then the annuity fund should, at her decease, be divided into as many shares as he should have children and grandchildren living at her decease; and that each then living child and grandchild, in respect to said fund, should stand upon an equal footing, and each receive one equal share thereof.

- Held* 1. That by the residuary clause the testator did not intend to give the residuary estate to his children and grandchildren living at the time of his death, absolutely, subject to be divested &c., *to be paid* at the end of ten years, or sooner, if the life nominees both died before; but that he intended to give it only to such children and grandchildren as should be living when the residue should be divided; and that, consequently, the legacies were executory and contingent. And so as to the legacies of \$100,000 given to each of the children, by the 9th clause.
2. That although during the trust and until the contingent future interests should vest, there was a suspension of the power of absolute disposition of the bulk of the estate, and was intended to be, yet that such suspension was not unlawful, inasmuch as the division of the estate must take place either at the expiration of the two lives mentioned, or within the continuance of at least one of the lives.
 3. That if the widow should die before either of the residuary life nominees, and her annuity fund should fall into the bulk of the estate, and be divided before the end of the ten years, on the death of the survivor of the life nominees, under the residuary clause, the alienation of the fund would have been suspended for three lives. That the first limitation over of the widow's annuity fund was therefore void.
 4. That the limitation over of the widow's annuity fund, to the children and grandchildren living at the decease of the widow, in case she should die after the division of the residue, contained in the 21st clause of the will, was valid.
 5. That no direction or provision of the will was void as involving an illegal restraint of the absolute alienation of any part of the estate; except the first limitation of the 21st clause.
 6. That there was no unlawful accumulation, directed or involved, in the provisions of the will. INGRAHAM, J. dissented.(a)
 7. That the whole will was valid, except the first of the alternative limitations over of the widow's annuity fund, in the 21st article, and (with that exception) should be carried into effect, so far as related to any objections made to it on those grounds.

(a) INGRAHAM, J. dissented from so much of the decision in this case as holds that the bequest of the residuary personal estate is valid; holding that the direction to invest the personal estate and the proceeds of the real estate for the payment of legacies at ten years thereafter, or any future period, necessarily produced an accumulation for the benefit of persons not minors, and was therefore void.

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The testator, by the 17th clause of his will, referred to a scheme on the part of the friends of African colonization, to erect and found a college in Liberia, Africa; and declared that if the enterprise should proceed and \$100,000 should be raised for the purpose, in this country, then and in such case he gave to his executors the sum of \$50,000, to be applied by them in such way as should in their judgment best effect the object; wishing his executors especially to have in view the establishment of a theological department in said college, to be under the supervision of the Union Theological Seminary in the city of New York. *Held* that this bequest was void; the object of the charity, the mode of applying it, and the time when it should take effect, being so uncertain and indefinite that the trust could not be enforced by the court.

Promissory notes, without consideration, given by a parent to his children, in his lifetime, cannot be enforced against his estate, after his death.

The payment of the interest on such notes, to the payees, by the maker, for two or three years before his death, will not make the notes valid against his estate.

A person can *give* goods, chattels or money, but not his own promises, so that they can be enforced.

APPEAL from a decree made at a special term, upon pleadings and proofs. The action was brought by the plaintiff, as sole acting executrix, against the children and heirs at law of Anson G. Phelps, sen. for a construction of his last will and testament. The will was executed on the 24th day of March, 1852, in due form of law to pass real estate, and the testator died November 30, 1853. The will, as set forth in the complaint, contained the following provisions: "*First.* I hereby nominate, constitute and appoint my beloved wife Olivia, my son-in-law William E. Dodge, and my son Anson G Phelps, the executrix and executors of this my last will and testament, and I do hereby fully authorize and empower them, or such one, or more of them as may prove this my will, and the survivors and survivor of them, to sell and convert into money all my estate, real and personal, whatsoever and where-soever, (except my present homestead and lands hereinafter devised to my wife,) and either at public or private sale, and upon such terms as they may think most conducive to the interests of my estate; and to make, execute and deliver, good and sufficient deeds and conveyances therefor to the purchasers

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thereof. And in case my son-in-law William E. Dodge, and my son Anson G. Phelps, shall both die before my estate shall be finally settled, then from and immediately after the death of the survivor of them, I do then appoint my two grandsons Daniel W. James and William E. Dodge, junior, executors of this my last will and testament, with the like power and authority, in all respects, as herein above mentioned and given to my other executors. *Second.* I give and devise to my beloved wife, the dwelling house where we now reside, at the corner of the First avenue and Thirtieth street, in the city of New York, together with the lots of land connected with it on which it stands, on the west side of the First avenue, bounded easterly in front by said avenue, southerly by Thirtieth street, and northerly by Thirty-first street, and extending back westerly on Thirty-first street, to James Stokes' line, and extending on Thirtieth street, westerly to the brick stable, and including the stable and the ground on which it stands, to have and to hold the same to my said wife, her heirs and assigns, absolutely and forever. *Third.* I give and bequeath unto my beloved wife all my household goods, furniture, plate, books and family stores, and also all my horses, carriages, harnesses and other effects pertaining to my house and stables, absolutely and forever. *Fourth.* I give and bequeath to my beloved wife the sum of five thousand dollars annually during her natural life, and direct my executors to invest, as a separate fund, in such securities as they may judge most expedient, a sum sufficient to yield that amount annually, to be paid to her in semi-annual or quarterly payments, as may be most convenient. The provision herein made for my said wife is intended, and is so given to her, in lieu of all dower and thirds out of my estate. *Fifth.* I give and bequeath to my niece Lois Howell, widow of the Rev. Mr. Howell, one thousand dollars, to be paid in ten annual installments of one hundred dollars each. *Sixth.* I give and bequeath unto Eliza Phelps, wife of my nephew Peter Phelps, of Derby, the sum of one thousand dollars. *Seventh.* I give and bequeath to

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each of my grandchildren living at the time of my death, ten thousand dollars, to be paid to them respectively, as they shall severally attain the age of twenty-one years. *Eighth.* I also give and bequeath to each of my grandchildren, living at my decease, the sum of five thousand dollars, to be paid to them as they severally attain the age of twenty-one years. This latter bequest I direct to be accompanied by my executors with this injunction, that each of my said grandchildren shall consider the said bequest as a sacred deposit, committed to their trust to be invested by each grandchild, and the income to be derived therefrom to be devoted to the spread of the gospel, and to promote the Redeemer's kingdom on earth, hoping and trusting that the God of Heaven will give to each of them that wisdom which is from above, and incline them to be faithful stewards, and transmit the same amount unimpaired to their descendants, to be sacredly devoted for the same objects. I know that this bequest is absolute, and places the amount so given beyond my control, but my earnest hope is that my wish may be regarded, as I leave it as an obligation binding simply upon their integrity and honor. *Ninth.* I give and bequeath unto each of my children, who shall be living at the end of ten years after my decease, the sum of one hundred thousand dollars, provided my son Anson G., or my son-in-law William E. Dodge, shall either of them then be living; but in case they both shall die before that time, then I give one hundred thousand dollars to each of my children, who shall be living at the decease of the survivor of them. *Tenth.* I give and bequeath to the 'American Bible Society,' formed in the city of New York in the year 1815, the sum of one hundred thousand dollars, to be applied to the charitable uses and purposes of the said society, and to be paid to the said society in ten annual installments of ten thousand dollars each—the first payment to be made in three years after my decease, and the like sum of ten thousand dollars annually thereafter, until the whole of said sum is paid. *Eleventh.* I give and bequeath to the 'American Board of Commissioners for Foreign Mis-

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sions,' located in Boston, the sum of one hundred thousand dollars, to be applied to the charitable uses and purposes of said board, and to be paid in ten annual installments of ten thousand dollars each; the first payment to be made in five years after my decease, and the like sum of ten thousand dollars annually thereafter, until the whole sum is paid. *Twelfth.* I give and bequeath to my executors the sum of one hundred thousand dollars in trust, to pay over ten thousand dollars thereof in seven years after my decease, to the person who, when the same is payable, shall act as treasurer of the 'American Home Missionary Society,' formed in the city of New York in the year 1826, to be applied to the charitable uses and purposes of the said society, and in like manner to pay over the sum of ten thousand dollars annually thereafter, for such charitable uses and purposes, until the whole of the said sum is paid. *Thirteenth.* I give and bequeath unto the 'Union Theological Seminary,' located in the city of New York, the sum of five thousand dollars, to be paid over to the said seminary in ten annual installments of five hundred dollars each. *Fourteenth.* I give and bequeath to the 'Theological Seminary,' located in Auburn, in the county of Cayuga and state of New York, the sum of three thousand dollars, to be paid over to the said seminary in three annual installments of one thousand dollars each. *Fifteenth.* I give and bequeath to the 'New York Institution for the Blind,' the sum of five thousand dollars, and it is my wish that the same, as far as practicable, may be applied to the use and benefit of poor pupils not otherwise provided for. *Sixteenth.* I give and bequeath to the 'Half-Orphan Asylum,' located in the Sixth avenue of the city of New York, the children of which attend the Mercer street church, the sum of one thousand dollars, to be paid by annual installments of one hundred dollars each, until the whole of said sum be paid. And I give the like sum, payable at the same time and in the same manner, to the 'Colored Orphan Asylum,' located on the Fifth avenue, near the lower Croton reservoir, of which last named asylum my daughter

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Caroline is one of the managers. *Seventeenth.* It has been contemplated by the friends of African colonization, to erect and found a college in Liberia, Africa, and it is understood that some incipient steps have been taken for that purpose by its friends in Boston, Massachusetts. Now, in case the enterprise, which I consider an important one, shall proceed, and one hundred thousand dollars shall be raised for that purpose in this country, then and in such case, I give to my executors the sum of fifty thousand dollars, to be applied by them in such way as shall in their judgment best effect the object; and I wish my executors especially to have in view the establishment of a theological department in said college, to be under the supervision of the Union Theological Seminary in the city of New York. *Eighteenth.* I give and bequeath unto my executors the sum of one thousand dollars, in trust, to pay over the same to the persons who, at my decease, shall be the deacons of the Congregational Church of my native place, in Simsbury, Connecticut, in the district of Hop Meadow, of which the Rev. Mr. McLain was pastor for many years; and my desire is to have the same invested, if it can be legally done, by the deacons of said church, for the time being, for the benefit of the poor of the town, and the interest only applied to their use: but if there be legal difficulties in the way of attaining this object, then I direct the same to be paid over to the said deacons, and applied by them, in their own discretion, for the benefit of the poor of said town, according to law. *Nineteenth.* I give and bequeath to my executors the sum of five thousand dollars, in trust, to pay over five hundred dollars thereof in one year after my decease, to the person who, when the same is payable, shall act as treasurer of the New York State Colonization Society, to be applied to the charitable uses and purposes of said society, and in like manner to pay over the sum of five hundred dollars annually thereafter, until the whole sum is paid. *Twentieth.* After paying and satisfying, or providing for the payment, of all the legacies and bequests herein above mentioned, in full, then as to all the rest,

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residue and remainder of my estate, whatsoever and wheresoever the same may be, I give, devise and bequeath the same to my children and grandchildren as follows: I order and direct the same to be divided into as many shares as I shall have children and grandchildren living at the end of ten years after my decease, provided that my son Anson G. Phelps, or my son-in-law William E. Dodge, shall either of them be living at that time. But if, before the expiration of ten years from my death, my son Anson G. Phelps and my son-in-law William E. Dodge shall both happen to die, then at the decease of the survivor of them, I order and direct my said residuary estate to be divided into as many shares as I shall have children and grandchildren living at the time of the decease of such survivor, it being my intention that each child and grandchild shall be placed upon an equal footing, as to the said residue, and each child and grandchild receive one equal share of my residuary estate, upon such division as aforesaid, as soon thereafter as can conveniently be done. *Twenty-first.* In case my dear wife shall die before a division of my residuary estate takes place, as provided for in the last preceding clause of this my will, then and in such case the fund reserved by my executors, to secure her annuity of five thousand dollars, will fall into the bulk of my estate, and form a part of such residue; but in case the life of my dear wife shall be spared beyond that period, then it is my will that the fund or principal sums invested to secure such annuity, shall, at her decease, be divided into as many shares as I shall have children and grandchildren living at her decease, and that each then living child and grandchild of mine, in respect to said fund, shall stand upon an equal footing, and each one receive one equal share thereof. *Lastly.* I do hereby fully authorize and empower my executors to compromise, compound, adjust and settle all claims and demands due to me, or to become due to me, and all difficulties and differences that may arise relating to my estate."

The complaint alleged that the said Anson G. Phelps, after

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the making and publishing of his said will, and on or about the 30th day of November, 1853, departed this life, at the city of New York, leaving the said will in full force and effect, uncanceled and unrevoked, and leaving him surviving his widow, the plaintiff in this action, his son Anson G. Phelps, junior, his daughters Melissa P., the wife of William E. Dodge, Caroline P., the wife of James Stokes, Harriet N., the wife of Charles F. Pond, and Olivia P., the wife of Benjamin B. Atterbury, his three grandchildren Daniel W. James, Elizabeth E. James, and Olivia P. James, children of his deceased daughter Elizabeth James, his only heirs at law surviving him.

That he also left surviving him, nineteen other grandchildren; and that since the death of the said testator, two other grandchildren had been born, to wit: Anson G. P. Atterbury, a child of his said daughter Olivia P. Atterbury, and Caroline Stokes, a child of his said daughter Caroline P. Stokes. That all the grandchildren of the said testator, excepting the said Daniel W. James, Elizabeth E. James, and William E. Dodge, junior, were minors, under the age of 21 years, and that they all resided in the city of New York, excepting two children of the testator's deceased daughter Elizabeth, viz: Elizabeth E. James and Olivia P. James, who reside with their father at Liverpool, in England, and the children of the testator's daughter Harriet N., who reside with their father and mother at Hartford, in the state of Connecticut. That at the time of the making of the will of the testator, and at the time of his death, he was seised and possessed of a large real and personal estate, most of which was situated in the state of New York where he resided, and was domiciled at the time of his death. But he died seised also of considerable real estate in the states of Connecticut, Pennsylvania, Indiana and Missouri. That some of the real estate in the state of New York, and some of that situated in other states, was subject to the lien of mortgages thereon, executed by the testator or by others from whom he had derived his title, and he was personally liable for the payment of the debts secured by most if not all of such

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bonds and mortgages; and that by the laws of the states where the real property of the testator is situated, his personal property in the hands of the plaintiff is the primary fund for the payment of the mortgages for the payment of which he was personally liable. That on the first day of October, 1845, the said Anson G. Phelps gave to his daughter Melissa, the wife of William E. Dodge, a promissory note in the words and figures following, to wit:

“New York, October 1st, 1845.

“Five years after date, for value received, I promise to pay Melissa Dodge fifteen hundred dollars, with one hundred dollars interest, on the first day of January, in each year.

ANSON G. PHELPS.”

That he continued to pay her the annual interest of \$100, specified in that note, yearly, and every year down to the time of his death; but he died without having paid her the principal sum of \$1500 mentioned in that note, or any part thereof, and the same, with the interest thereon from the first of October, 1853, still remains unpaid and wholly unsatisfied. That on the said first day of October, 1845, the said Anson G. Phelps gave also to each of his other daughters, viz: Caroline P. wife of the said James Stokes, and Harriet N. wife of the said Charles F. Pond, a promissory note bearing the same date and of the same amount and to the same tenor and effect, as the above mentioned note to his said daughter Melissa. That he continued to pay to each of them the interest on said notes annually to the time of his death, but died without having paid the principal sums, or any part thereof, and the same, with the interest thereon from the first October, 1853, still remain wholly unpaid and unsatisfied. That after the making of the aforesaid will, and a few days before the death of the testator, he gave to his son, Anson G. Phelps, junior, a promissory note for \$100,000 in the words and figures following, to wit:

“New York, November 25th, 1853.

“My dearest beloved son, Anson G. Phelps, junior—I have long had a desire to place something in your hands to be used

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prudently after my decease. I herewith inclose you my note for \$100,000, payable to you, or your order, five years after the first January, 1854, to be used by expending the interest annually, but reserving the principal, the interest of which shall be devoted wholly to the spreading of the everlasting gospel, to be retained in my son's hands until near the close of his life, then to be well invested by him, or his executors, one-half of the principal for the benefit of the American Bible Society, of which Joseph Hyde is now the general agent; the other half of the principal to be in like manner invested by him, or his executors, for the benefit of the American Board of Commissioners for Foreign Missions, at Boston, of which Henry Hill is now treasurer. In accordance with the inclosed proposition, I herewith inclose my note, viz: dated January 1, 1854. I, for value received, hereby promise to pay to Anson G. Phelps, junior, or order, \$100,000.

(Signed,)

ANSON G. PHELPS.

Witness—HARRIET N. POND.

OLIVIA PHELPS."

This note, testamentary paper, or instrument in writing, was duly signed, published and declared by him in the presence of the two witnesses, who subscribed their names thereto as such witnesses, and at his request. That, in the states of Connecticut, Pennsylvania, Indiana and Missouri, where portions of the real estate of the testator were situated, the time during which the absolute ownership of such estates may be suspended by will is governed by the principles of the common law of England, and where the rents and profits of such real estate are not disposed of by the will of a testator during the continuance of such a suspension of the absolute ownership and the power of alienation, no valid trust or direction for the accumulation of such rents and profits is created in or by the will, such rents and profits belong to those who would have been entitled to such real estate by descent, if such testator had died intestate, and in the same proportions. But that the law of primogeniture does not exist in either of those

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states; the real estate of an intestate who dies seised thereof descending to all his children living at the time of his death, and to the descendants of those who have died leaving issue, equally, *per stirpes*, the descendants of a deceased child taking the share which such deceased child would have taken if living at the death of the intestate. That at the time of the death of the said Anson G. Phelps he was a copartner in the firm of Phelps, Dodge & Co., which firm consisted of himself, his son Anson G. Phelps, jun., and his sons-in-law William E. Dodge, Daniel James and James Stokes. That the partnership property of the said firm consisted both of real and personal property; the legal title to which real property had been vested in all of the said copartners, in fee, as joint tenants, and not as tenants in common, for the sole purpose of giving to the surviving members of the firm upon the death of any of them, the legal title and power of selling for the benefit of all the copartners and their representatives. And that the plaintiff, after she had taken out letters testamentary, and assumed the execution of the will of her deceased husband, sold to the surviving copartners of the said firm of Phelps, Dodge & Co., all her right and interest as the executrix of the said Anson G. Phelps, deceased, in the real and personal estate of the said firm or copartnership, being thirty per cent of the capital stock, property and effects of the copartnership, which was the amount of the testator's interest therein (the remaining seventy per cent thereof belonging to the other surviving copartners,) for the price or sum of \$689,569.83 which was the full value of the testator's beneficial interest in the real and personal estate of the said firm or copartnership, at his death, and at the time of such sale. That subsequently to the death of the testator, his widow and his daughters, together with the husbands of his daughters Melissa P. Dodge, Olivia P. Atterbury and Caroline P. Stokes, executed under their hands and seals, and delivered to his son Anson G. Phelps, jun., a written agreement or covenant, in the words and figures following, to wit:

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“New York, 14th December, 1853.

Whereas, the late Anson G. Phelps, on or about the twenty-fifth day of November last, executed a note to his son Anson G. Phelps, jun., for the sum of one hundred thousand dollars, to be paid in five years from the first of January, 1854, which note is now held by the said Anson G. Phelps, jun.; Now, we the undersigned, heirs and next of kin to the said decedent, knowing the intentions of the said decedent, and to relieve the executors of the will from any possible objections to the payment of said note, do hereby acknowledge its legality and validity, and do for ourselves and our respective heirs, executors and administrators, consent and agree that the said executors shall and may pay the said note in due course of administration of said estate.” That the plaintiff, as the widow of the testator, and subsequent to his death, and within one year thereafter, elected to take the provision made for her in his will in lieu of her dower in his real estate, and that she had sold certain portions of his real property under the power in trust contained in said will, and for prices which she deemed sufficient, and which sales she believed were proper and beneficial to the testator’s estate. That the personal estate of the testator, and the income thereof, would probably be more than sufficient to pay and discharge all the valid legacies given by the will, except the residuary bequest to such of testator’s children and grandchildren as should be living at the time appointed in such will for the general distribution of the testator’s residuary estate, and to pay and discharge the expenses of administration, and all the testator’s debts, except those which by law are primarily chargeable on the real estate of which the testator died seised. That the American Bible Society, mentioned in the tenth section of the will, and in the said letter, testamentary paper, or instrument of the 25th November, 1853, was and is a body corporate, duly incorporated by or under an act of the legislature of the state of New York, by the name of “The American Bible Society.” That the American Board of

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Commissioners of Foreign Missions, mentioned in the eleventh section of said will, and in the said letter, testamentary paper, or instrument in writing of the 25th of November, 1853, was and is a body corporate, duly incorporated by or under an act of the legislature of the commonwealth of Massachusetts, by the name of "The American Board of Commissioners for Foreign Missions." That the American Home Missionary Society, mentioned in the twelfth section of the will, is not a body corporate, but an association of persons associated by or under the name of "The American Home Missionary Society" for religious purposes, and especially for the purpose of sending the gospel to remote and destitute portions of the United States of America, and that Jasper Corning, of the city of New York, was, at the death of the testator, and still is, the treasurer of the said association. That the Union Theological Seminary, mentioned in the thirteenth and seventeenth sections of the will, was and is a body corporate, duly incorporated by or under an act of the legislature of the state of New York, by the name of "The Union Theological Seminary in the city of New York." That the Theological Seminary located in Auburn, mentioned in the fourteenth section of the will, was and is a body corporate, duly incorporated by or under an act of the legislature of the state of New York, by the name of "The Trustees of the Theological Seminary of Auburn, in the state of New York." That the New York Institution for the Blind, mentioned in the fifteenth section of the will, was and is a body corporate, duly incorporated by or under an act of the legislature of the state of New York, by the name of "The New York Institution for the Blind." That the Half Orphan Asylum, mentioned in the sixteenth section of the will, was and is a body corporate, duly incorporated by or under an act of the legislature of the state of New York, by the name of "The Society for the relief of half orphans and destitute children in the city of New York." That the Colored Orphan Asylum, mentioned in the sixteenth section of said will, was and is a body

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corporate, duly incorporated by or under an act of the legislature of the state of New York, by the name of "The Association for the benefit of colored orphans in the city of New York." That at the time of the testator's death, the deacons of the Congregational Church in Simsbury, Connecticut, in the district of Hop Meadow, mentioned in the 18th section of said will, were Jury Wilcox and A. Case. That the New York State Colonization Society, mentioned in the 19th section of said will, is not a body corporate, but an association of persons associated by or under the name of "The New York State Colonization Society," for the benevolent purpose of colonizing, on the coast of Africa, free people of color, with their own consent, and that Nathaniel Hayden is at present the treasurer of the said New York State Colonization Society, and was such treasurer at the death of the testator. The complaint further showed, that since the death of the testator, various questions had arisen relative to the construction and validity and legal effect of many of the devises, bequests, trusts, and powers in trust, in said will contained, made or created, or attempted to be created; and as to the validity of the said several notes, given by the said testator to his daughters, and as to the validity, construction and legal effect of the note and letter, testamentary paper or instrument in writing, of November 25th, 1853, hereinbefore set forth; which questions were particularly specified in the complaint.

The complaint further showed, that Charles M. Pond, an infant, one of the grandchildren of the testator, now presumptively entitled to a share in the division of the testator's general residuary estate under the 20th section of the will, if the residuary devise and bequest contained in that section is valid, had, by John G. Vose, his guardian, lately commenced an action against the plaintiff as such executrix, and others, in which action it was, among other things, stated and insisted in substance, that some of the legacies and bequests in the said will are invalid, but without specifying which of them are so invalid; that receivers had been appointed in that suit

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of all the rents, income, proceeds and profits of all the real estate within this state whereof the said Anson G. Phelps died seised and possessed remaining unsold, except the homestead, which was specifically devised to his widow, and is now in her possession, and of the interest and income arising from the proceeds of the real estate which had been sold and disposed of under the power in trust contained in the will, with the usual powers and duties of receivers in like cases; and the said suit was still pending and undetermined. The plaintiff was therefore advised that she could not, with safety to herself and to the rights and interests of others, proceed and complete the execution of her trust as executrix of the said will, without the aid and protection of this court in giving a judicial construction to the several provisions of the will and of the said notes, letters and papers, so far as questions have arisen or may arise thereon. She claimed that all the legacies, bequests and devises in the will were valid, and that the said several notes to the testator's daughters, and the note and letter, testamentary paper, or instrument in writing, given by the testator to his son, were also valid, and that all the said notes ought to be paid out of the testator's personal estate; and she prayed that this court would, by its decision, decree or judgment, decide and declare the proper construction of the will, and other matters in reference to which such questions had arisen, and give proper directions in reference thereto, and so as to enable her to execute her trust properly and with safety. And that proper accounts might be taken from time to time of the estate of the testator which had come or might come to her hands, and of her administration of the estate, and between her and the legatees, and the devisees, and the next of kin of the testator. And for general relief.

The defendant, Anson G. Phelps, jun., put in an answer admitting most of the facts stated in the complaint; insisting upon the validity of the note, testamentary paper, or instrument in writing for \$100,000, given to him by the testator; and joining in the prayer of the plaintiff, for a judicial con-

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struction of the will. Separate answers were put in by the other defendants, submitting their rights to the protection of the court. The action was brought to a hearing, upon the pleadings and proofs, at a special term held by Justice CLERKE; who subsequently made the decree appealed from.

Marshall S. Bidwell, for the respondent Olivia Phelps, and the appellant Anson G. Phelps.

B. F. Butler, for the infant defendants Olivia P. James &c. and for Mrs. James.

M. Porter, for the appellants Pond and wife.

E. H. Owen, for the infant defendants, Chas. M. Pond &c.

Wright & Merrihew, for the appellants B. R. Atterbury and wife.

Charles Edwards, for the infant defendants, the Atterburys.

SUTHERLAND, J. This case calls for the construction of the will of Anson G. Phelps, sen., deceased, late merchant of the city of New York; who died on the 30th November, 1853, leaving a widow and five children, Anson G. Phelps, jun. Mrs. Dodge, Mrs. Pond, Mrs. Stokes, Mrs. Atterbury, and twenty-two grandchildren, him surviving. Three of these grandchildren were children of a deceased daughter, Mrs. James; the other grandchildren were children of the four daughters before named. After the testator's death, and before the commencement of this action, two more grandchildren were born. All the grandchildren, excepting three, were minors when the action was commenced. The testator died seised and possessed of real and personal estate of the value of about two millions, exclusive of the homestead devised to his widow; his real estate, exclusive of the homestead, having been valued at

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\$1,069,650, subject to mortgages to about the amount of \$254,000; and his personal property inventoried at \$999,867.19. The greater part of the real estate was in the city of New York; the remainder in Connecticut, Pennsylvania, Indiana and Missouri. In addition to bonds and mortgages, to the amount of about \$254,000, all executed by himself, the testator was individually indebted at the time of his death, exclusive of the notes to his children, to about the amount of \$47,000. The net annual rent of his real estate, in the city of New York, was about \$24,500, and in Connecticut \$9,500; total \$34,000. The testator by his will, which is dated the 24th March, 1852, appointed his wife executrix, and his son Anson G. and his son-in-law William E. Dodge executors. The executrix has alone qualified; the executors have neither qualified nor renounced. The executrix has sold to the survivors of the firm of Phelps, Dodge & Co., of which firm the testator was a member at the time of his death, all the interest of the testator in the assets of the firm for \$689,569.83. The partnership property consisted both of real and personal property; the legal title to which property had been vested in all of the copartners in fee as joint tenants, and not as tenants in common, for the sole purpose of giving to the surviving members of the firm, upon the death of any of them, the legal title and power of selling for the benefit of all the copartners and their representatives. The executrix has, under the will, sold other portions of the real estate, and was continuing to do so until restrained by injunction. The widow has elected to take the provisions made for her in the will in lieu of dower. To provide for her annuity of \$5,000, she has, as executrix, set apart bonds and mortgages and other securities to the amount of \$104,100, and yielding an annual interest of \$7,325.50. These bonds and mortgages, &c., are in her own hands. Some portion of the \$254,000 of mortgages was on real estate not in this state.

In construing this will, the first question is whether the real estate of the testator is to be considered as converted into

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money under the power of sale contained in the will. In the first section of the will, immediately after appointing his executrix and executors, the testator says: "And I do hereby fully authorize and empower them, (the executrix and executors,) or *such one* or more of them as may prove this my will, and the survivors and survivor of them, to sell and convert into money all my estate, real and personal, whatsoever and wheresoever, (except my present homestead and lands hereinafter devised to my wife,) and either at public or private sale, and upon such terms as they may think most conducive to the interest of my estate; and to make, execute and deliver good and sufficient deeds and conveyances therefor to the purchasers thereof." The power of sale and of conveyance, it is seen, is as full as it well could be drawn. This power is given, before any devise or bequest is made, and appears to have been the first thing thought of after the appointment of his executrix and executors.

I think that in construing and giving effect to the will this power must be considered as having been exercised, and the real estate all converted into money. From the whole will it appears to have been the intention of the testator to have this done. The most important purposes and provisions of the will appear to me to call for this conversion. Indeed, I do not see how the evident intention of the testator as to the final disposition of his residuary estate, the payment of the contingent legacies, and even the payment of some of the vested legacies, can be carried out without it. There is no express direction in the will to sell; but as the execution of the power to sell is not made expressly to depend on the will of the executors, it is therefore imperative. (1 R. S. 734, § 96.) After the devise of the homestead to his wife, in the second article of the will, the word devise is not found until we come to the residuary clause. The testator died seised of real estate, exclusive of the homestead, worth a million; and yet there is not a specific devise in the whole will of any part of it, and not a word referring to it as distinguished from the personal,

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in the whole will, except in the first article, in giving the executors the power of sale, and in the residuary clause, where the word devise is used. In the third article, after the devise and bequest of the homestead, and household furniture, plate, books, &c., to his wife, the testator by the fourth article gives to his wife an annuity of \$5000, and directs his executors "to invest, as a *separate fund*, in such securites as they may judge most expedient, a sum sufficient to yield that amount annually," &c. There is no other separate investment of any other part or portion of the estate directed, but the whole residue and bulk of the estate, real and personal, with the rents, issues and income thereof, in the absence of any express devise to the executors, or to any one else, is left to go, until, and as the legacies are paid, or provision is made for their payment as the will directs, and until the residuary clause takes effect by the vesting of the residuary estate absolutely in possession in the residuary devisees or legatees, under it, where the law, or reasonable implications of the intention and purposes of the testator, derived from the several express provisions of the will, and its general scope and scheme, will carry it. Now, by law the personal property goes to the executors without any express direction; but where did his real estate with its rents, issues and profits go on the testator's death? Who was to have the possession and use of the same until the legacies were paid or provided for by the executors, and until the residuary estate should vest absolutely in possession under the will? From the express provisions, what are we to infer was the testator's intention in relation thereto? After separating and setting aside the fund for the use of his wife, for life, and after giving away, absolutely or contingently, out of the remainder and bulk of his estate, \$1,200,000 in legacies, the residuary clause is, "*after paying and satisfying, or providing for the payment, of all the legacies and bequests hereinabove mentioned, in full, then as to all the rest, residue and remainder of my estate whatsoever and wheresoever the same may be, I give, devise and bequeath the same to my children and grand-*

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children, as follows: I order and direct the same to be divided into as many shares as *I shall have* children and grandchildren living at the *end of ten years* after my decease, *provided* that my son Anson G. Phelps, and my son-in-law Wm. E. Dodge, shall either of them be living at that time. But if before the expiration of ten years from my death, my son Anson G. Phelps and my son-in-law Wm. E. Dodge, shall *both* happen to die, then at the decease of the survivor of *them* I order and direct my residuary estate to be divided into as many shares as I shall have children and grandchildren *living* at the time of the decease of such survivor, it being my intention that each child and grandchild receive one equal share of my residuary estate upon such division as aforesaid, as soon thereafter as can conveniently be done."

Now it is very clear, that the testator intended to dispose of *all* his estate by his will; he does expressly devise and bequeath it *all*—the *residue*, *after* the payment or provision for the payment of *all* the legacies, and *subject* to such payment or provision. The postponement of the residuary devise and bequest until after the payment or provision for the payment of all the legacies; the contingency as to the time of the division of the residue among the children and grandchildren *then* living; the division itself by the executors; the careful postponement of the payment of the large vested, absolute legacies to the religious and charitable corporations and societies; their payment in annual installments; the postponement of the payment of the vested legacies to the grandchildren, of \$15,000 each, in the seventh and eighth articles of the will, until they severally arrive at the age of twenty-one; the fact that the vesting of the contingent executory legacies of \$100,000 to each of his children in the ninth article, is made to depend as to the time of their vesting absolutely, upon the same contingency, as the time of the division of the residuary estate among the children and grandchildren; the fact that this contingency might occur within a month or ten days after the testator's death, and if so, that *then* the \$1,200,000, given in legacies, must be paid, or the payment of them provided for

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by the executors out of the personal property, diminished by the fund set apart for the widow, and the simple contract debts of the testator, and out of the real estate, diminished by the \$250,000 of mortgages; and that *then*, also, the residue of the whole estate must be divided by the executors among the children and grandchildren; the fact that the residuary clause does *not* vest the residuary estate in the children and grandchildren *living at the testator's death*, on his death, (as I shall presently show,) but that the devise and bequest in that clause is executory, and by it the residuary estate cannot vest, until the end of ten years from the testator's death, unless the life nominees, Anson G. Phelps, jun. and William E. Dodge, *both* die sooner; all these facts and circumstances show—the whole scheme of the will shows—that the testator did not intend that his real estate should go to his heirs at law, with its rents and profits, subject to be divested at the end of ten years, or on the death of the life nominees, if they die before, in favor of the residuary devisees; but that he intended his whole estate, real, with its rents and profits, or its proceeds, as well as personal, except the homestead, furniture &c., specifically devised to his wife, to go into the hands of his executors; and that they, after investing *separately* out of the same the fund for the widow's annuity, and paying out of the same the trifling amount of legacies payable immediately, and the testator's debts, should hold the residue in bulk, in trust, to pay or provide for the payment of the contingent and postponed legacies, and to make the division of the final residue under the residuary clause. As the expectant estates and interests of the children and grandchildren in the residuary estate, created by the residuary clause, cannot properly be called *limitations*, on a previous term, nor even *limitations* without a previous term, of *any particular parcel of real estate or fund*, but are executory devises and bequests of an undefined residue of the bulk of the estate to be kept together by the executors in trust until the residuary clause takes effect; and *then*, (the bulk of the estate, and not the residue,) to be divided, and

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one part of it taken by the executors to pay or to *provide* for the payment of *all* the legacies, and the other part and residue to be divided by the executors, at the *same* precise time, among the children and grandchildren under the residuary clause; the whole trust closing when this division of the bulk of the estate, and of the residue among the children and grandchildren takes place; I think the provision of the revised statutes, (1 R. S. 726, § 40,) that “When, in consequence of a valid *limitation* of an expectant estate, there shall be a suspense of the power of alienation, or of the ownership, during the continuance of which the rents and profits shall be undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate,” has no application here; even admitting these expectant estates to be *valid*, and the suspense of the power of alienation to arise from the creation of these expectant estates, and not from the trust; and that this section applies to contingent future estates as well as to vested future estates. Now, as it is very clear, from the whole will, that the testator intended his executors to take his whole estate, real, as well as personal, and the rents and income thereof; and as it is very natural and reasonable, and the testator probably intended, that, taking it, they should first apply the rents and income to the payment of the legacies, and thus increase the dividend of the residuary estate; and as an express devise to the executors, of the *real* estate, to receive the rents, issues and profits thereof in *trust*, to apply the same towards the payment of the legacies would have been illegal, and the trust void; (*Hawley v. James*, 16 Wend. 61, 144, *opinion of Bronson, J.*;) and as there is a full express power in the will to the executors to sell and convey all his real estate; I think the will of the testator should be carried out and executed in all its parts, if it can be, by considering the power of sale exercised, and the real estate of the testator converted into money. It is the duty of the court to consider the real estate of the testator converted immediately into money,

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under the full power of sale, if by so doing the will can be carried into effect. (*Van Vechten v. Van Veghten*, 8 Paige, 104. *Haxtun v. Corse*, 2 Barb. Ch. 519.) The conversion of the whole real estate into money involves the payment or disposition of the \$250,000 of mortgages.

Looking, then, upon the real estate as converted into money, and the money in the hands of the executor, in trust, for the purposes of the will, the *second* question is, whether the effecting these purposes *may* involve the unlawful suspension of the power of the absolute disposition of this money, or of any part of it; or *necessarily* involves an unlawful accumulation of its interest, or of any part of it? In the examination of this question the first thing to be looked at is the residuary clause, as furnishing the key to the whole will. Is the devise and bequest by the residuary clause a devise and bequest of the residue to the children and grandchildren *living at the death of the testator* absolutely; giving them a vested estate and interest in the residue on his death, liable to be divested in favor of the survivors as they severally might die before the time for the actual division of the residue, and to open and let in after-born grandchildren; or is the devise and bequest to such of the testator's children and grandchildren living at his death or born afterwards *as shall be living at the end of ten years*, or at the death of the survivor of the two life nominees if they both should die before the expiration of the ten years? Is the expectant estate or interest of the testator's children and grandchildren now living, in the residuary estate, vested; or is it *contingent*, depending for its vesting upon their living until the end of ten years, or until the event happens upon which the residue is to be divided sooner? And here let me remark, that if this expectant estate were limited as a remainder, the question would be precisely the same whether you call the whole residue money or land. Previous to the revised statutes money as well as any other chattel could be limited over after a term, by way of remainder, (2 Kent, 5th ed. 352 353; *Moffat v. Strong*, 10 John. 12;

Westcott v. Cady, 5 *John. Ch.* 334,) and by the revised statutes, (1 *R. S.* 773, § 2,) "limitations of future or contingent interests in personal property, are made subject to the rules prescribed therein, in relation to future estates in lands." Now I concede, that if the future interests in the residuary estate created by the residuary clause were interests in a particular fund, which had been previously set apart, and the use of it previously given for a particular term, like the widow's fund for life, then these interests might be considered limited as remainders; and then they might be vested; certainly the liability to be divested by death, in favor of the survivors, and to open and let in after-born grandchildren, would not have prevented their vesting on the death of the testator, in the children and grandchildren then living. The liability to defeasance by condition subsequent cannot prevent an estate from vesting. Such defeasance and consequent revesting in some other, *is an alienation*. But as the residuary bequest in this case, looking upon the whole estate as converted into money, is a bequest of an indefinite residue of the bulk of the estate, previously and up to the very instant of the bequest taking effect, kept together in trust, without any previously limited term or use of such residue as a *distinct separate fund*, such bequest cannot be considered, and cannot take effect, as a remainder.

The simple question, then, is as to the intention of the testator;—did he intend to give the residuary estate to his children and grandchildren living at the time of his death, absolutely, subject to be divested &c., *to be paid* at the end of ten years, or sooner, if the life nominees both died before; or did he intend to give it only to such children and grandchildren as should be living when the residue should be divided? I think the latter; and that, consequently, the legacies are executory and contingent.

The legacy of \$100,000 to each of his children in the ninth article, is clearly contingent. The *bequest* is, unto each of my children *who shall be living* at the end of ten years, &c. Then

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three legacies of \$100,000 each are given to three religious societies or corporations, payable severally in ten annual installments of \$10,000 each, the first installments payable three, five and seven years after the testator's death; thus postponing the payment of the last installments thirteen, fifteen and seventeen years. Now, the words of the residuary clause are: "After paying and satisfying or providing for the payment of all the legacies and bequests hereinabove mentioned, in full, then as to the residue &c., I give, devise and bequeath the same to my children and grandchildren as follows," &c. The devise and bequest by its very terms is not a *present* but a *future* devise and bequest. It is not a devise and bequest of the residue, after paying &c., the before mentioned legacies; but after paying them &c., a devise &c., of the residue. But how is the residue to be divided, and between what children and grandchildren? The will is, "I order and direct the same to be divided into as many shares as I shall have children and grandchildren *living at the end of ten years*." The bequest of the legacies of \$100,000 each in the ninth article, is not to each of his children, but to each of his children *who shall be living at the end of ten years after his decease*, &c. Although there are words of present gift, yet the objects of the gift cannot be ascertained until the end of ten years, or the event happen upon which these legacies and the residuary bequests are all to be paid, or their payment provided for, sooner, and at the same time. Although in the residuary clause there are words of present gift in addition to the direction to *divide*, yet I think the testator intended to give to such children and grandchildren as should be living at the time the division of the residue should take place.

If there was any direction in the will that the income or interest of a portion of the estate should be paid to or applied or accumulated for the benefit of, the children and grandchildren of the testator, living at the time of his death, until the legacies in the ninth article should be paid, and the residuary estate should be divided, that would be a circumstance to

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show that he intended to give to his children and grandchildren living at his death, absolutely. (2 *Williams' Ex'rs*, 1059, 1061, 1066, 7, and cases there cited.) The law favors the vesting of legacies, but the law cannot vest them against the words and plain intention of the testator.

The vesting of the residuary interests, and of the legacies given by the ninth article, is contingent. This contingency and the provision to be made for the payment of the postponed vested legacies, calls for the trust, and the trust supports the contingent legacies and the contingent future residuary interests. Now it is plain, that between the two, the trust and this contingency, there is a suspension of the power of the absolute disposition of the bulk of the estate, and that there was intended to be. The testator intended the income of his estate to be applied to the payment of the installments of his charitable legacies, as they should fall due, and of the vested legacies given to his grandchildren, as they severally arrived at the age of twenty-one, and thus make his estate work in the hands of the trustees after his death, to increase the residuary dividend. The scheme involves the keeping of the bulk of the estate together, undisposed of, until the event or the time occurs, when the residuary estate is to be divided, the contingent legacies paid, the others provided for, and the trust closed. It is immaterial, whether the restraint upon alienation is caused by the contingent future interest, or the trust, or both. During the trust, and until these contingent future interests vest, the absolute disposition of a great part of the estate is suspended. The important question is whether this suspension is unlawful. It must cease during the continuance, or at the expiration of two lives, or it is unlawful. It is evident, that the suspension cannot continue longer in this case.

By the residuary clause, the residuary estate is to be divided by the executors among the children and grandchildren, on the death of the survivor of the two life nominees, if they *both* die before the expiration of ten years, or at the expiration of ten years. Of course, this division must take place, either at the

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expiration of the two lives, or within the continuance of at least one of the lives. If the division is postponed ten years, *one of the lives must be living*; if the division takes place sooner, it must be at the expiration of the *surviving* life. I do not see that it makes any difference that Anson G. Phelps, jun., one of the life nominees, is also one of the expectant residuary legatees. By the statute, the life nominees may or may not be irrespective of the estate. It is true, all his sisters and all the grandchildren might die before the expiration of the ten years, leaving him the expectant of the whole residuary estate; but if he lived to the end of the ten years, it would vest absolutely in him, and, if he died before, it would vest absolutely under the statute of distributions or of descents; and so, in any event, the residuary estate must vest absolutely and the trust close, at the expiration of the two lives, or during the continuance of one of them.

It follows, that no direction or provision of the will is void as involving an illegal restraint of the absolute alienation of any part of the estate, unless it is the bequest over of the widow's fund on her death, by the 21st article. This fund cannot fall into the bulk of the estate and form a portion of the residue, if the widow dies before the division of the residue; for then its absolute alienation might be suspended for three lives. If the widow should die before either of the residuary life nominees, and her fund should fall into the bulk of the estate and be divided before the end of the ten years on the death of the survivor of the life nominees, under the residuary clause, the alienation of the fund would have been suspended for three lives. But I do not see why the limitation over of this fund to the children and grandchildren living at the decease of the widow in case she dies *after the division of the residue*, is not valid. This limitation is contingent and may never take effect; but if it does take effect the alienation cannot thereby be suspended longer than one life; it must take effect absolutely on her death. Reject the first limitation over of the fund in case of her death before the division of the

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residue as unlawful, and you have a second good limitation over, nowise affected by the first.

On the death of the widow, therefore, this fund will go and vest absolutely either in the children and grandchildren under the second limitation in the 21st article; or it will go, as undisposed of by the testator, after the widow's death, to his next of kin, under the statute for the distribution of intestates' estates; but as in any event it cannot vest absolutely in possession either in the children and grandchildren under the second limitation of the 21st article, or in the next of kin as undisposed of, *until the widow's death*; she having a good life use of the whole of the fund; it is impossible that the widow has, or can ever have, any other right or interest in this fund, than her life use. It would certainly be very extraordinary, if the widow was entitled to a share of a remainder (for it is the remainder and not the reversion that is undisposed of absolutely) limited on her own life.

Having considered the objections to the will, founded on the supposed unlawful restraint of the right of absolute alienation, let us now consider the other principal objection, that it involves necessarily an unlawful accumulation of the interest, rents and income of the estate.

If the carrying out of the will requires an accumulation of the interest, &c., it must be unlawful, for such accumulation would not be for the benefit of minors exclusively; and the accumulation which might be lawful for the benefit of the minors exclusively, cannot be separated from the accumulation for the benefit of others, which would be unlawful. Now looking at the whole estate as converted into money, and in the hands of the executrix at the death of the testator; and after the payment of the debts and the small legacies payable immediately, at the residue as invested for the purposes of the will and its trusts; I know of no rule of law which would prevent the application of the interest and income first to the payment of the legacies as they should become payable; and if so applied, I cannot say from the pleadings and proofs in

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this case, that there must be any accumulation. \$300,000 of the estate has gone, or must go, to pay the debts of the testator ; and the proofs do not disclose the ages of the twenty-two grandchildren, living at the testator's decease, who are each to have legacies to the amount of \$15,000 paid to them as they arrive severally at the age of twenty-one. Who can say, how soon the whole trust will terminate, when all the legacies are to be paid or to be provided for, and the residuary estate is to be divided, by the death of the survivor of the two life nominees ?

Whether the whole estate is to be considered as converted into money or not, I cannot say that there need be any accumulation. There is in the will no direction for an accumulation. If there was, that would be void. There being no direction for accumulation, the court must see that some provision or direction in the will necessarily involves an unlawful accumulation, before they can declare the will, or any part of it, void for that cause. I think there is no unlawful restraint upon alienation, nor any unlawful accumulation directed or involved, in the provisions of the will, and that the whole will is valid, (except the first of the alternative limitations over of the widow's fund in the 21st article as aforesaid,) and (with that exception) should be carried into effect, so far as any objections have been made to it by any of the parties on those grounds.

As to the religious and charitable legacies, I think they all come within *Owens v. The Missionary Society M. E. Church*, (14 *New York R.* 380,) and are valid ; except the conditional one of \$50,000 for erecting and founding a college in Liberia, Africa. All the other charitable legacies are given to corporations, capable of taking, or to trustees capable of administering the charities ; and the charity, or object of the other charitable legacies is sufficiently plain and distinct. If the legacies given in the 12th, 18th and 19th articles of the will, should be considered as given to the treasurer of the "American Home Missionary Society," to the "Deacons of the Congregational

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Church in Simsbury, Connecticut, &c.," to the acting "Treasurer of the New York Colonization Society," mentioned in those articles of the will respectively, in trust for the charitable uses and purposes in those articles severally specified, and not to the executors in trust, although formally so expressed, still I think the bequests valid; the charities being sufficiently definite, and the treasurer, deacons, &c., being persons easily ascertained and capable of taking. But the gift in the 17th article for the erection and founding of a college in Liberia is, I think, too indefinite to be enforced. What kind of a college did the testator mean? Religious, literary, or a college of physicians? As he wished his "executors to have in view the establishment of a theological department in said college, to be under the supervision of the Union Theological Seminary in the city of New York," perhaps he meant a literary or theological college. But how did he intend it to be under the supervision of the "Union Theological Seminary in the city of New York?" Did he mean his money to go to the erection of the building, or to "the establishment of a theological department?" Who were to be the trustees of the charitable use? The executors are only to *pay over* or *apply* the money in the first instance. It is true they are to apply it in their discretion, but the object of the charity, and the trustee, should be sufficiently certain to enable the court to decree the execution of the trust. How long are the executors to wait for the \$100,000 to be raised by the friends of the college in Boston? All these things are indefinite; and, upon the whole, I think, the object of the charity, the mode of applying it, and the time it should take effect, so uncertain that the trust cannot be enforced by the court. And a charitable trust, the execution of which cannot be legally enforced, must be considered void.

I have noticed, I believe, all the questions raised in this case, involving the construction of the will or the validity of any of its legacies or provisions. The only remaining questions in the case are as to the validity of the notes, or papers

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called notes, given by the testator in his lifetime to his son Anson, and to his daughters, Mrs. Dodge, Mrs. Stokes and Mrs. Pond. I do not see how any of them can be legally enforced against the estate. They were all gifts of mere promises of the testator, without consideration, in his lifetime, and I cannot see how they can be enforced against his estate after his death.

The letter of the testator to his son, which accompanied the gift of the note for \$100,000, shows not only that it was a mere promise without consideration, but that the testator never intended it to have the force and character of a valid promissory note in his lifetime. *It was not delivered to be enforced against the testator, but against his estate.* To hold the note valid would be in effect to give the note the force and operation of a codicil to the will, properly executed according to the forms of law; and thus a mere naked promise made by the testator after his will would be made to operate as a revocation of the disposition by his will of one hundred thousand dollars of his estate. I do not see how the payment of the interest on the notes to the daughters, for two or three years before his death, can make the notes valid against his estate. The notes, as against the testator, were without consideration and void in the hands of the daughters. The payment of the interest could not react and make the notes valid from their inception. One can *give* goods, chattels, money, but not his own promises so that they can be enforced. If there is a consideration for the promise, it is not a gift.

Let a decree be settled, on four days' notice, in accordance with the principles and directions stated in this opinion.

. DAVIES, P. J., concurred.

INGRAHAM, J. The power to sell all the real estate was not necessarily to be executed, in order to carry into effect the subsequent provisions of the will. A sale of sufficient to pay all the bequests and legacies provided for, except those in the

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20th clause, would have been sufficient to enable the executors to close up the estate after the expiration of the time embraced by the limitations therein. After these payments were made, the real estate would pass, under the devise in the 20th clause of the will, as fully as if the real estate had been converted into money under the power of the 1st article ; or if that clause is not valid, it would vest in the heirs at law of the testator. And for the purpose of division into equal parts or shares, it would not be necessary that the same should be sold. The estate in the lands would vest in the devisees, or heirs, and it is apparent from the whole clause that the division into shares was merely to show the intent of the testator that his children and grandchildren then living should each receive an equal share of the residuary estate. The mere authority to sell all the real estate was not under any portion of the will obligatory upon the executors to sell, and even if the testator thought the power advisable for the more easy settlement of the estate, still it left to the executors the discretion of deciding whether they would sell, or not, the portion that would remain to be distributed under the residuary clause.

I feel much hesitation in adopting any view of this question which could be construed into an evasion of the provisions of law in regard to trusts. It must be conceded that a devise to the executors, of the real estate in trust to carry out the subsequent provisions of the will, would in many respects be illegal, as creating trusts not allowed by law. To hold that the executors could do under a power what they could not do under a devise of the real estate, would be a palpable evasion of these provisions ; while the construction suggested—that this power to sell was given for the purpose of enabling the executors to pay the moneys to be paid from time to time under the will, and not necessarily requiring a sale of all the testator's real estate, so as to apply the rule which would convert it into personal property—would be no violation of law, and at the same time would leave the estate in the portion of the real estate un-

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sold to vest in those to whom it was devised, or who inherited it. If the estate, real and personal, is to be considered as solely personal under the power to sell, then the difficulty arises under the other provisions, that the personal estate is directed to be held for accumulation for the benefit of other than minors; and the same difficulty exists as to the personal estate which is bequeathed by the 20th clause.

The will gives specific legacies, to be paid absolutely before the division of the residuary estate, to an amount exceeding one-half the real estate. The payment of those legacies depends upon contingencies which may postpone that payment for years, or which might happen in the case of some of them at any moment. The postponement of the payment of these legacies, and the distribution of the residue in any event, for ten years, clearly renders an accumulation necessary, and that accumulation necessarily operates for the benefit of those taking under the residuary clause. There are already in existence two grandchildren born after the death of the testator, and many of those who were in being at his death were not minors. If the accumulation had been specially directed, so as to make the amount larger for those entitled to the residue, it would have been illegal. Shall the testator be allowed by such an evasion to effect a result which the law forbids his doing directly?

The direction to pay the legacies does not limit such payments to be made out of the income. If the income is insufficient, they must be paid out of the principal of the estate. The delay in these payments, and the consequent delay of distribution of the residue, enables the executors, by the accumulation of interest, to increase the amount of the principal to be paid under the 20th clause of the will. If such a result could not have been directed by the testator in his will, surely the court ought not to sustain, as valid, provisions producing the same results, because the testator does not in words direct the accumulation.

The bequest to the widow, under the 4th article, of an an-

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nual sum in lieu of dower is undoubtedly valid, and is not objected to by any of the defendants. But the provision in the 21st article, which disposes of the fund reserved for the payment of such annual sum, appears to me to be illegal, because it suspends such distribution for the period of three lives. The fund must be reserved during the life of the widow, and it cannot be divided under the 20th article before ten years, unless the son and son-in-law of the testator are also dead. It is said, "under other contingencies it might only be suspended for one life, viz., that of the widow, in case she outlived the other two lives." But still the two other lives on which the distribution was also made contingent, must have first terminated, and that termination was necessary before such distribution could be made, whether the widow outlived the son and son-in-law or not.

There can be no doubt that the absolute ownership of this fund may be suspended during the lives of more than two persons. It must be suspended during the life of Anson G. Phelps, jun., who has died before the widow, and it cannot be distributed during the life of Mr. Dodge, if he lives for ten years from the death of the testator. So far as the 21st article disposes of this fund in the contingency of the three lives, it is illegal and void.

The same difficulty applies to the provision in case the widow shall live beyond this period (of a division of the residuary fund.) This is equally dependent on three lives. The division of that fund is dependent on two lives. This condition applies to the division of the residuary estate which is contingent on two lives and the death of the widow. In any view that may be taken of the provisions of the 21st section, they are illegal and void, as suspending the absolute ownership of the fund for more than two lives.

I do not think the executors can properly anticipate the payment of the legacies. The whole scope and tenor of the will and the particular bequests, as well as the direction to provide a fund for their payment, all show that the testator

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intended that the payments should not all be made at once. To the children and grandchildren they are made payable, either after ten years, or arriving at age; to the societies or other charities, they are payable at future periods, and in divided amounts. It would not be a compliance with the will of the testator to have them paid at once; and when such clearly appears to have been his intention, courts should not defeat it by allowing such payments to be made in gross, and in anticipation.

As to the other points submitted to us, I concur in the conclusions to which Justice Sutherland has arrived.

The judgment of the special term is erroneous, in my judgment, in holding the 20th article of the will to be valid. It appears to me that the bequest and devise is void, so far as relates to the personal estate, inasmuch as the provisions of the will are such as to direct an accumulation for the benefit of persons not minors.

It is also erroneous in holding that the bequest of \$50,000 for a college in Africa, is valid. Such bequest is void, for uncertainty as to the object of the testator.

It is also erroneous in holding that the widow was entitled to one-third part of the fund reserved for her income.

It is also erroneous in holding that the executors may anticipate the payments of the legacies which the testator has made payable at future periods, and in divided amounts.

It is also erroneous in holding that the surplus income of the personal property should be paid over to the children and grandchildren. It would go to the children who were living, and the issue of such as are dead, and not to the grandchildren whose parent was living at the time it became payable.

[NEW YORK GENERAL TERM, September 20, 1858. *Davies, Sutherland and Ingraham, Justices.*]

DAVID DOWS, survivor of Ira B. Cary, *vs.* JOHN RUSH.

- A statement of the evidence, or a comment upon it or its effect; an assumption of a fact in the cause; or a mere reference to what is established by the evidence, by a judge in his charge to the jury, are not grounds of exception to the charge.
- A party who is dissatisfied with the expression of an opinion, by a judge upon a question of fact, or the conclusion at which he arrives in regard to it, must express that dissatisfaction, not by excepting to the charge of the judge on that point, but by asking to have the question of fact submitted to the jury for their determination.
- An exception to the *charge*, on the ground that a particular question should have been submitted to the jury as a question of fact, is not a compliance with this rule; where the judge has made no charge to the contrary, nor been *requested* to submit the question to the jury, and has not *refused* to do so.
- An exception to the charge, in such a case, is not equivalent to a *request* to the judge to submit the question, and a *refusal* to do so.
- A general exception to the whole charge, and to each and every part thereof, raises but a single exception to the entire charge, and is unavailable if any portion of it be correct.
- Whether it is sufficient, within this rule, for a party to except to the charge "and to each part thereof *separately and distinctly*?" *Quære.*
- N. & W. of Buffalo, being the owners of a quantity of corn, at that place, sold the same to M., through B., his agent; it being a part of the arrangement that N. & W. should transport the corn to New York, for M., on their boats. N. & W. thereupon executed an instrument stating the shipment of the corn, the quantity thereof, the name of the boat, the amount of freight, the terms of payment of the purchase money; and that the corn was on account of, and addressed to, M., care of D. & C., and was to be delivered as addressed, without delay. *Held* that this was a bill of lading.
- Held also*, that upon its face, the instrument was a certificate from N. & W. in both their capacities, of owners of the shipping boat and owners or vendors of the corn, that the grain was shipped on account of M. or for his benefit, and for his benefit as the purchaser and owner of the goods, to D. & C. as consignees.
- And such bill of lading having been delivered by N. & W. to B., and by him sent to M.; *Held* that M. had lawful possession of the same, as apparent owner, and through such bill of lading the constructive—the legal—possession of the corn; and that the transfer of such bill by him, amounted to a transfer of the corn.
- Held further*, that persons receiving, in good faith and as security for advances actually made, a transfer of the bill of lading and of the goods, from M., were brought within the protection of the rule of law which prefers the title of a bona fide purchaser from a fraudulent vendee, to that of the original owner.

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Held, also, that in the absence of proof that the purchase of the corn was *originally* fraudulent, or that the transaction was obnoxious to any other imputation of fraud than such as arose from a *subsequently conceived* determination not to pay for the goods, N. & W. and those claiming title to the corn under them, were, as against the assignees of the bill of lading, *estopped* from denying that N. & W. held the grain as M.'s agents and carriers; they not being in a situation effectually to dispute the title of the assignees, thus acquired.

D. & C., the assignees of the bill of lading, were to be deemed the consignees of the corn, and as such entitled to a *lien* thereon, for the amount of their advances, under the act relative to *principals and factors*. (*Laws of 1830, ch. 179, §§ 1, 2. 2 R. S. 4th ed. 184.*)

The statute does not limit the consignees to the right of detention of the goods when in their actual possession, for the enforcement of their lien; but it also authorizes an action by them, to obtain possession, against a party claiming them without right, or under an inferior title.

In such an action the plaintiffs are not restricted, in respect to the amount of damages, to their advances and interest thereon.

In an action of replevin, by a party having a lien, the plaintiff, as in other actions of replevin, is entitled to a return of the property, and if a return cannot be had, to its value.

ACTION to recover 2703 bushels of corn, being the cargo of the canal boat Cuba, of which the appellant was master. The action was tried before Justice EDMONDS, on the 21st day of December, 1849, who *directed* the jury to find for the plaintiffs, to which the defendant excepted. Judgment was rendered upon the verdict for \$2559.64. The defendant appealed to the general term on a bill of exceptions. The plaintiffs were commission merchants in New York, and claimed the property under a bill of lading in the following words:

“No. 142—Duplicate.

Buffalo, Aug. 7, 1848.

Shipped in good order, by Niles & Wheeler, agents, on board canal boat Cuba, master, Am'n Trans. Co. Line, the following named articles, marked and consigned as in the margin, to be delivered as addressed without delay.

Ac. I. F. Mack, care of Dows
& Cary, New York.

(In pencil)

Drft. 8 Aug., at 30 days,

\$1000.

2540 bush. corn, 142, 2406.

Freight to New York, a bushel, 13c.

NILES & WHEELER,
per E. H. Walker.”

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Niles & Wheeler were forwarders at Buffalo, and agents of the American Transportation Line of canal boats, which line was owned by them and M. M. Caleb, of New York, who was their partner in the forwarding business. That business was transacted in New York under the firm name of M. M. Caleb & Co. Niles & Wheeler also purchased and sent corn to market on their own account. In this business Caleb probably had no interest, except in the freight. Mack resided at Rochester, and was a dealer in grain. James L. Bloss resided at Rochester, and had for several years been purchasing grain in his own name, but in fact as the agent of other persons and by their direction. He had for five or six months previous to the transaction in question been making such purchases from other parties than Niles & Wheeler, as the agent of Mack; and had subsequently received the money from him to pay for such purchases. In transactions of this kind he had asked for duplicate bills of lading, and the vendors had in some cases given the bills before the delivery of the property, and before receiving payment. They had trusted to his honor and the integrity of the man at Rochester to send the money, and it had always come. That was the reason alleged by him why he went in and got the bills of lading in question in this case.

Niles & Wheeler resided at Buffalo and had purchased a cargo of about 10,000 bushels of corn, which was on board the propeller *Montezuma*, lying near their warehouse at Buffalo. On Monday, the 7th of August, 1848, Bloss called at the office of Niles & Wheeler and proposed to purchase the corn, intending it for Mack, but did not mention the fact that he was acting as an agent. The negotiation was between Bloss & Niles. The price asked was 44 cents per bushel, and Bloss said he would take the corn if he could have a little time to get money from Rochester, and gave a reference for certainty of payment. Niles said he wanted no reference, as they would only sell the corn for cash. Bloss thereupon left the office, but was immediately called back by order of Niles, when the negotiation proceeded. Niles asked where Bloss

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wished to transport the corn, and on being answered to New York, he said they could perhaps make an arrangement if he (Niles) could transport the corn. It was finally agreed that Bloss might have the corn by paying for it on Friday; that the money should be paid, half on Friday and the remaining half on Saturday, and that Niles & Wheeler should transport the corn to New York on their boats, at thirteen cents per bushel. Niles said he would not sell on credit to any body—that he would hold the corn on his boats until it was paid for. Bloss said Niles would be indemnified by the property itself, as he (Bloss) would not get possession of it until it was paid for. Bloss immediately telegraphed to Mack advising him of the purchase of the corn, mentioning the quantity and price; and on the evening of the same day Bloss received the bill of lading before referred to, executed in the name of Niles & Wheeler, by Walker, their clerk. He had been before in the habit of making out bills of lading, and evidence was given on the part of the plaintiffs sufficient, uncontradicted, to show a general authority upon that subject. The defendant gave evidence tending to show that Walker had no authority to sign such bills of lading, but only bills for *short freight*, that is, for places short of New York, and not where the goods shipped belonged to Niles & Wheeler. He made a distinction between receipts for property and memoranda of shipment (such as he claimed these to be) and regular bills of lading. The corn was shipped on the boats Cuba, Neptune, P. B. Langford and A. Beardsley. The lading was, according to Bloss, commenced on the same day, (Monday, 7th August,) others thought at a later day, and, as Bloss thinks, it was completed as to two boats (the Cuba and Neptune) the same day. Van Inwegen, the tally clerk, says the loading of the Neptune was commenced on Monday and completed on Tuesday or Wednesday; and the Cuba (the one in question) started first, on the 9th, Wednesday, and the Neptune on the 10th, Thursday. The evidence left the time of lading in some doubt. On Monday, the day of the purchase, Bloss got the tallies of the cargo of

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the two boats, (Cuba and Neptune,) and delivered them at the office of Niles & Wheeler about six or seven o'clock in the evening, and received from Walker, their clerk, bills of lading of the two boats, similar to that above mentioned. Bloss sent the bills of lading to Mack the same day, informing him that the corn was to be paid for on Friday or Saturday. The plaintiffs had been at Rochester on the 5th or 6th of August, and had agreed with Mack to make advances to him on corn to 38 cents per bushel on his furnishing shipping bills for the corn. The business was to be done on the part of the plaintiffs by James Chappel, their general agent at Rochester. Mack was to furnish the shipping bills to Chappel, who was to indorse Mack's drafts on the plaintiffs for the amount of the advance, which the plaintiffs were to accept and pay. Advances to Mack in the same way had been made before. On Tuesday, the 8th of August, Mack presented to Chappel the two bills of lading, A and B, (Cuba and Neptune,) drew two bills on the plaintiffs, one for \$1000 at 30 days, and one for \$800 at 25 days, both payable to the order of Chappel, and both were indorsed by him on receiving the bills of lading, and the drafts were delivered to Mack. Mack passed the drafts to the Rochester City Bank. On the same day Chappel enclosed the shipping bills to the plaintiffs in New York. The two drafts were presented for acceptance, by the American Exchange Bank, and accepted by the plaintiffs on the 10th of August, (Thursday,) and were paid at maturity.

On Friday, the 11th of August, Bloss sought Niles and told him that he had sent shipping bills of the corn to Rochester to Mack, for whom he had bought the corn; that he had not received the money, and did not know what the matter was; that he had never been disappointed in receiving money, but had previously received it promptly in every instance. Niles said this was the first he had heard of Mack or of shipping bills; and he should sell the corn. Bloss asked him to wait until he could telegraph Mack and get an answer; and Bloss did telegraph him several times without getting any answer.

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He then proposed that Niles or his clerk should go with him (Bloss) to Rochester, saying he would pay the expenses and get the money or give up the corn. Niles said Van Inwegen (his clerk) might go, and he went that day with Bloss to Rochester, where Bloss found that Mack had failed and left town on Thursday. On Saturday Van Inwegen telegraphed Niles that the corn was not paid for, and Mack had run away. Niles then sold the corn to P. Durfee & Co. at Buffalo. Durfee & Co. consigned the corn and delivered the bills of lading to Arthur H. Root. Root transferred them to Joseph H. Green, jun., the latter to Green & Mather, and they to L. W. Brainerd; and under these parties the defendant claimed to hold the property, and on demand made refused to deliver it to the plaintiffs. On Saturday afternoon Niles went to Rochester; went up the canal on Sunday and met three of the four boats, and gave them new bills of lading on account of P. Durfee & Co., care of Arthur H. Root, Albany. The Cuba had passed Rochester before he got there. He sent a like bill after her to be signed, which seems to have been done. The boats had all left Buffalo with bills of lading to M. M. Caleb & Co., N. York.

On Friday, the 11th August, when Niles was informed of the bills of lading to the plaintiffs, he telegraphed them as follows: "Ten thousand and ninety bushels corn, shipped by us on boats Cuba, Neptune, A. Beardsley and P. B. Langford, ac. I. F. Mack, to Dows & Cary, is not paid for. We notify you to consider and hold same for our account till further notice.

NILES & WHEELER."

When the Cuba arrived in New York, the plaintiffs called on the defendant, the master, and demanded the corn, offering to pay charges. The defendant said he knew nothing about it, or had nothing to do with it; that he was obeying the orders of Mr. Caleb. He said a man had followed him and changed the bill of lading; that he believed it was originally shipped to Dows & Cary. The plaintiffs then brought replevin, and the property was re-delivered to the defendant, upon his undertakidg. For the purpose of showing the author-

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ity of Walker to make bills of lading, the plaintiffs called James M. Hubbard, who testified that he had been in the forwarding business for ten years; knew Niles & Wheeler, who were also in the forwarding business, and also knew Walker; that Walker was a *clerk* of Niles & Wheeler, in August, 1848; "his business was in various branches, *but chiefly in making out bills of lading.*" The papers A, B and C, (the bills of lading in question,) were in the handwriting of Walker, and the signature was his; "the signature is Niles & Wheeler, per E. H. Walker;" I believe Walker was *in the habit* of signing that way; I have seen it before." "I have seen other bills of lading signed by Walker for Niles & Wheeler; had some myself; the bills now shown me are signed by him; I received them from Walker and paid the charges to him." Two such bills of lading were then produced and read, dated June 20 and July 6, 1848. These bills were of property shipped by Niles & Wheeler on the boats of the witness, and in those cases Niles & Wheeler were shippers and not carriers. The bills of lading in question, (marked A, B, C,) were then read in evidence without objection.

After the plaintiffs rested, the defendant moved for a nonsuit, 1. For want of evidence of authority of Walker to legalize exhibits A, B and C; 2. Because they were not bills of lading, and transferred no interest in the property; 3. Because they had not been duly assigned or transferred to the plaintiffs; 4. Because the plaintiffs had showed no title to or interest in the property in question. The court denied the motion, and the defendant excepted. The defendant called Niles, and the clerk Walker, for the purpose, among others, of disproving the authority of the latter to sign these bills of lading, and their evidence was in substance as before detailed. *Niles was the out door man* of the firm; and *Wheeler was not called*. The bills of lading were entered on the shipping books by Walker at the time they were delivered to Bloss, Monday August 7. Some alterations were made in them afterwards, and it does not distinctly appear that Niles & Wheeler had *actual* knowl-

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edge of their having been issued until Friday, the 11th of August. The case being closed, the motion for a nonsuit was renewed, on the same grounds as before, and denied, and the defendant excepted. The court charged the jury that the evidence showed a sufficient authority or assent to bind Niles & Wheeler by the signature of Walker to the papers A, B and C, and that they, and the defendant under them, were estopped from denying, as against the plaintiffs, that they held the corn as Mack's agents and carriers on his account, at the time of the plaintiffs' advances on the faith of the receipts or shipping bills, and that the plaintiffs were entitled to recover the property. To which charge, and to each part thereof, separately and specifically, (so the case expresses it,) the counsel for the defendant excepted. The defendant's counsel also excepted to said charge on the ground that the question of sufficient authority or assent should have been submitted to the jury as a question of fact. The defendant's counsel then requested the judge to charge the jury that the plaintiffs were not entitled to recover damages beyond the amount of their advances, and interest thereon. His honor the judge refused so to charge, and to his refusal the counsel for the defendant excepted. The jury found a verdict for the plaintiff, and assessed the value of the property at \$1621.21, and the plaintiff's damages for the detention thereof at \$151.36. Judgment was entered upon the verdict, for \$2559.64, damages and costs, and from this judgment the defendant appealed to the general term.

John E. Burrill, for the appellant. I. The title of the plaintiff rests wholly on the written instruments, A and C, and these appearing on their face to have been executed by a party purporting to act as the agent of Niles & Wheeler, the plaintiff was bound to inquire as to the extent of Walker's powers, and is chargeable with knowledge of those powers such as they turn out in fact to be. (*Dows v. Perrin*, 16 *N. Y. Rep.* 328.)

II. The act of Walker, if valid and binding on Niles & Wheeler, was in effect—1st. A transfer to Mack of 10,000 bushels of corn, belonging to Niles & Wheeler; and, 2d. An agreement to transport the corn to New York as carriers for him. And the plaintiff is not entitled to the corn unless he establishes the authority of Walker to do both of these things.

III. The evidence in the cause clearly showed that Walker had no authority to do these things. (1.) It is not denied that the corn was the property of Niles & Wheeler, the grain merchants. And it is not pretended that Walker ever had authority to sell or transfer the title to property belonging to Niles & Wheeler. (2.) As to the instruments regarded as agreements of Niles & Wheeler to transport and carry the property as carriers for Mack. The evidence given by the plaintiff was that of Hubbard, who testified that Walker had signed shipping lists for Niles & Wheeler for property *shipped by them* on his, Hubbard's, boats, but he had never known Walker to sign bills for Niles & Wheeler for property shipped on their own boats. In such cases, Niles & Wheeler were *shippers*, and not carriers. The evidence on the part of the defendant showed that Walker had no special authority to sign the paper procured by Bloss, and that he had never signed papers of a like character. That the only papers he had ever signed were in cases where Niles & Wheeler had, as forwarders, received freight which came down the lake, and which they shipped by lines *other than their own* to places along the canal. That the papers spoken of by Hubbard were of that character, and were delivered to the captains or owners of the line to enable them to comply with the statute as to clearances. (1 R. S. 240, §§ 121, 2.) That he had never signed papers where property was destined for New York, nor where the effect was to transfer the property of Niles & Wheeler, or to authorize its transfer, unless he had unconsciously done so in the present instance. It has been repeatedly decided that papers of that character do not operate upon the *title* to prop-

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erty. (*Ackerman v. Humphrey*, 1 *Carr. & Payne*, 309. *Tucker v. Humphrey*, 4 *Bing.* 516.) The court of appeals has decided in *Dows v. Perrin*, on the same facts, that Walker's execution of the instruments in question was beyond the scope of his agency.

IV. Under the circumstances, however, the judge erred in charging the jury that the evidence showed a sufficient authority or assent to bind Niles & Wheeler by the signature of Walker to the papers. The least that could have been granted, under the circumstances, would have been to leave the question to the jury, under proper instructions. But even conceding that Walker had authority to sell the property of Niles & Wheeler, and to make contracts for the transportation of property actually shipped on their boats, the plaintiff was not entitled to recover.

V. Mack acquired no title to the corn, as against Niles & Wheeler, nor any right to sell it, he being a party to the instruments, affected by the fraud of Bloss, and being obliged to claim directly through and adopt the fraudulent acts by which Bloss procured such instruments. (*Dows v. Perrin*, *supra*. *Covill v. Hill*, 2 *Seld.* 374.) (1.) The proof shows that there was, in fact, *no sale or agreement for the sale* of the corn made between Niles & Wheeler and Bloss. (38 *Eng. Law and Equity*, 582.) (2.) Bloss knew that Walker had no authority to sign the pretended bill of lading, especially if they purported to affect the *title or possession* of the corn. (3.) Bloss knew, moreover, that Niles & Wheeler did not *intend* to part with the title or possession of the corn, or confer on him or Mack any power over it. (4.) Mack's position as to title was precisely the same as if he had *personally* committed the fraud by which Bloss obtained the signature to the pretended bill of lading. (*Dexter v. Adams*, 2 *Denio*, 646. *Hawkins v. Appleby*, 2 *Sandf. S. C. R.* 421. *Olmsted v. Hotailing*, 1 *Hill*, 317, 318. *Selden's Notes*, Dec. 1853, p. 80. 7 *East*, 164-166, *Ld. Ellenborough, Ch. J.*) (5.) If these papers purported to divest the title or possession of Niles &

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Wheeler, Mack was in the condition of one who claims by fraud, not only, but through a felony. (*Barb. Crim. Law*, 124 to 130, 2d ed. *Andrews v. Dieterich*, 14 *Wend.* 31, 34 to 37. *Hoffman v. Carow*, 20 *id.* 21.) (6.) But if Bloss's act amounted to *fraud* simply, and not to a felony, it clearly gave Mack no title to the corn, nor any authority to sell or interfere with it. (1 *Smith's Lead. Cases*, 543, *et seq.*, note 43, *Law Lib.* 3 *Comst.* 381, 382, *Ruggles, J.* *Williams v. Merle*, 11 *Wend.* 80, 81. *Cary v. Hotailing*, 1 *Hill*, 311 *Olmsted v. Hotailing*, *Id.* 317. *Andrews v. Dieterich*, 14 *Wend.* 31, 34. 38 *Eng. Law and Eq.* 582.) (7.) The court of appeals decided in *Dows v. Perrin*, that Mack had no right of property in the corn, and that his pretended purchase through Bloss was void on account of fraud. (*Opinion of Denio*, citing *Brower v. Peabody*, 3 *Kern.* 126.)

VI. Assuming that the pretended bills were regular on their face, the delivery of such *bills* to the plaintiff transferred no interest *in the corn*, for the reason that Mack had not any interest which he could transfer as against Niles & Wheeler, the owners. (*See fifth point.*) (1.) One whose attempt to control the custody of goods would be *tortious* as against the owner, cannot transfer them *by a bill of lading fraudulently obtained*. (1 *Smith's Lead. Cases*, 543, *et seq.* note. *Blackb. on Sales*, 279 to 289, *Law Lib.* 1 *H. Black. R.* 359 to 362, *Ld. Loughborough.* *Gurney v. Behrend*, 3 *Ellis & Blackb.* 622, 633, 634. 3 *Kern.* 628, 629, *Comstock. J.* *Covell v. Hill*, 2 *Seld.* 374. 1 *Smith's Lead. Cases*, 890, *Phil. ed.* 1855. *Osey v. Gardner*, 1 *Holt's N. P. R.* 405. 6 *East*, 41, *Ld. Ellenborough.* *Thompson v. Doming*, 14 *Mees. & Wels.* 402. 38 *Eng. Law and Eq.* 582.) (2.) The validity of such transfers is not recognized except where the assignor has at the time some right or authority *operative as against the owner until rescinded*. (1 *Smith's Lead. Cases*, 543, *et seq.* note. *Blackb. on Sales*, 285-289. 3 *Ellis & Blackb.* 622, 633, 634. 38 *Eng. Law and Eq.* 582. 3 *Kern.* 628, 629, *Comstock, J.* *Covill v. Hill*, 2 *Seld.* 374. 6 *East*, 41, *Ld.*

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Ellenborough. Osey v. Gardner, 1 *Holt's N. P. R.* 405. *Court of Appeals, Denio v. Perrin, Denio, J.*) (3.) Mack having got the pretended bills of lading contrary to the owners' consent, the plaintiff is not aided by the statute relating to principals, factors, &c. (1 *R. S.* 774, § 1. *Covill v. Hill*, 2 *Seld.* 374. 3 *Ellis & Blackb.* 622, 623.) (4.) Besides, Mack, according to the claims of the plaintiff, is the *consignee* of the corn, and the case is not within the reach of the principal and factor's act. (5.) Moreover, the owners *actually shipped the corn in their own name*, and the plaintiff does not even pretend that Mack was intrusted with the bills or corn as agent, but as *vendee*. (*Covill v. Hill*, 2 *Seld.* 374. 49 *Eng. Common Law Rep.* 673, 700, 701, *Tindall, Ch. J.*) (6.) The bills having been obtained by Mack through the fraud or felony of his agent, the transfer of them to the plaintiff could not confer on the latter any right as against the true owners. (*Barb. Crim. Law*, 134-138, 2d ed. 14 *Wend.* 31, 35-37. 20 *id.* 21. 3 *Ellis & Blackb.* 622, 633, 634. 3 *Kern.* 628, 629. 2 *Seld.* 380, *Gridley, J.* *Brower v. Peabody*, 3 *Kern.* 121. 1 *Holt's N. P. R.* 405.) (7.) The court of appeals in *Denio v. Perrin*, decided, "*that when a bill of lading is obtained by fraud from the owner of the goods, a bona fide indorsee or transferee has no better title than the transferer had.*"

VII. The pretended bills of lading, however, were documents so unusual and irregular on their face, that every one who saw them would know that they were not given in the ordinary course of business, and the plaintiff therefore acquired no better title under those than Mack. (1.) They did not purport to be bills of lading in any sense; one of them being a single paper, relating to four separate shipments in four separate vessels and, all lacking the *signatures of the masters*. (*Covill v. Hill*, 2 *Denio*, 323, 330, 1; *S. C.* 2 *Seld.* 374, 375. 1 *T. R.* 217, *Buller, J.* 3 *Kent's Com.* 268, 7th ed. *Bouv. Law Dic.* title *Bill of Lading*. 1 *Jacob's Law Dic.* title *Bill of Lading*. 1 *Bouv. Inst.* 353, 354.) (2.) The plaintiff is there-

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fore chargeable with knowing that *regular bills were outstanding*, controlling the possession and final destination of the corn. (1 *R. S.* 240, §§ 121–124. *Ross on Commercial Law*, 161, 162, *Law Lib.* 1 *Smith's Lead. Cases*, 550, *note. Law Lib. No. 43.* *Craven v. Rider*, 6 *Taunt.* 433. *Jenkyns v. Osborne*, 7 *Man. & Granger*, 698. 1 *Smith's Lead. Cases*, 900, *note, Phil. ed.* 1855. 5 *Barn. & Adol.* 313, 316, *Denman, Ch. J.* *Conrad v. Atlantic Ins. Co.* 1 *Peters' Rep.* 387. *Caldwell v. Ball*, 1 *T. R.* 205, 214, 212. 16 *Pick.* 476, *Shaw, Ch. J.* *Bank of Poughkeepsie v. Hasbrouck*, 2 *Seld.* 216.) (3.) The plaintiff knew also that these pretended bills were not transferable, as a *symbol of property or possession*, there being no words of *negotiability* in them. (*Ackerman v. Humphrey*, 1 *Carr. & Payne*, 53. *Tucker v. Humphrey*, 4 *Bing.* 566. *Ross on Commercial Law*, 151, 152, *Law Lib.* *Jenkyns v. Osborne*, 7 *Man. & Granger*, 698. 1 *Smith's Lead. Cases*, 605, *Phil. ed.* 1855. *Abbott on Shipping*, 397, 398, *Boston ed.* 1846. *Blackb. on Sales*, 275. 2 *Kent's Com.* 722, 725, 7th ed.) (4.) The judge, however, erred in taking away from the jury the question of the *bona fides* of the plaintiff, as he did by charging that the plaintiff was entitled to a verdict. (*See preceding subd. of this point.* *Byles on Bills*, 23, *Phil. ed.* 1853. *Nixon v. Palmer*, 4 *Seld.* 398.)

VIII. The court erred in charging the jury that the evidence showed a sufficient authority or assent to bind Niles & Wheeler by the signature of Walker. The court also erred in charging the jury that *Niles & Wheeler* were estopped from denying that they held the corn as Mack's agents and carriers on his account. (1.) Because Walker had no authority to make any contract for the carriage of the corn. (*Supra.*) (2.) The doctrine of estoppel is wholly inapplicable, especially as the papers were not designed or intended to facilitate transfers by Mack, or to be acted on by his *assigns*. (*See 7th point and subdivisions.* 3 *Kern.* 600, 638, 639, *Comstock, J.* *Freeman v. Cooke*, 2 *Exchequer Rep.* 654. *How-*

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ard v. Hudson, 2 Ellis & Blackb. 1. Cowles v. Bacon, 21 Conn. Rep. 451.)

IX. The court erred in charging the jury that the plaintiffs were entitled to a verdict for the property. (1.) There being no written evidence of authority of Walker, its extent was to be inferred from the testimony, and the defendant was entitled to have the jury pass upon it. (2.) By said charge, the judge took away from the jury the question of the *bona fides* of the plaintiffs, which bore not only upon the plaintiffs' title, but also upon the estoppel. (3.) All the matters set out in the seventh point, entered into the question of the plaintiff's good faith, and should all have been submitted to the jury.

X. The defendant in this action was the master of the vessel on board of which the corn was shipped; and under the facts proved, was not estopped by any act of Niles & Wheeler. (1.) As such master, he had executed a regular bill of lading, acknowledging the receipt of the corn, and agreeing to deliver it to the consignee therein, and was bound to deliver it accordingly. (2.) The consignee having taken possession of the corn at Albany, the defendant, though still retaining possession of the corn, acted as the bailee of the consignee, and was not the agent of Niles & Wheeler. (3.) Having given his receipt for the property and *contracted* to deliver it to the consignee, the captain, so far as such property is concerned, has a distinct individuality and *becomes a principal*. (4.) Niles & Wheeler themselves could not have recovered the possession of the property on the mere production of the bill of lading under which the plaintiff claims. (5.) Niles & Wheeler could not have taken from the defendant the property for which he had signed a bill of lading, nor could they authorize any one else to do so; nor could their statements or declarations affect the defendant. (6.) The papers under which the plaintiff claims are not executed by the defendant; nor is he in any way a party thereto; and so

far as he is concerned, they are the mere declarations of Niles & Wheeler, and he should not be estopped thereby.

XI. The title of Durfee & Co. and their assignees to the corn in suit, was superior to that of the plaintiff. (1.) The plaintiff acted on papers which neither did nor could transfer the actual possession of the corn, unless Mack had the rightful possession as against Niles & Wheeler. (*Phillip v. Huth*, 5 *Mees. & Wels.* 596. 49 *Eng. Com. Law*, 698. 27 *id.* 90, 91. *Ross on Commercial Law*, 151, 152. 1 *Smith's Lead. Cases*, 543, *et seq. note*; also see *points* 5, 6, 7. (2.) The plaintiff took from one who had neither the actual possession nor the customary symbol of it; and acquired no apparent legal title, but a mere equity, subject to prior rights, and to be overthrown by a legal title. (*Point* 5. *Vattier v. Hinde*, 7 *Peters*, 271. *Boone v. Chiles*, 10 *id.* 212. *Beckman v. Frost*, 18 *John.* 544. *Wheeler v. Ginley*, 20 *Pick.* 545. 1 *Smith's Lead. Cases*, 543, *supra.*) (3.) On the other hand, Durfee purchased from the party having possession of the property, and received the usual, ordinary and customary bills of lading, acknowledged by the master, and they were in turn duly and formally assigned and transferred.

XII. The court erred also in refusing to rule that the plaintiff's recovery should be limited to the advances and interest. (1.) The plaintiffs were obviously not *bona fide* purchasers in any sense, except to the extent of their actual advances to Mack, *i. e.* 38 cents per bushel. (*Ross on Commercial Law*, 150, *Law Library Eq. In re Westzinthus*, 8 *Barn. & Adol.* 817. *Spaulding v. Bearan*, 6 *Bear.* 380.) (2.) The plaintiffs have actually recovered by the erroneous ruling of the judge for a greater amount than their advances, without any allowances for freight or charges.

G. C. Bronson, for the plaintiff. I. The instrument in question, though not in the form commonly employed where the shipment is by sea, is, by the settled usage in our inland trade, a bill of lading, with all the force and effect which

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properly belong to bills of lading. (*Dows v. Perrin*, 16 *N. Y. Rep.* 325, 328, 9. *Gibson v. Stevens*, 8 *How.* 384. *Bank of Rochester v. Jones*, 4 *Comst.* 497. *Dows v. Green*, 16 *Barb.* 72. 3 *Kent*, 207. *Abbott on Shipping*, 218, *ed. of 1822, by Story.* *Grove v. Brien*, 8 *Howard*, 429.)

II. The authority of Walker to act as the clerk or agent of Niles & Wheeler in making the bill of lading, was abundantly established in the first instance; and there was nothing in the subsequent proofs to controvert that evidence—at least so far as third persons are concerned. (1.) The authority of Walker was so fully established in the first instance, that no objection was made against reading the bill of lading in evidence. Walker was *the clerk* of Niles & Wheeler, and made and signed other bills of lading, some of which were delivered to the witness Hubbard. “His business was in various branches, but *chiefly in making out bills of lading.*” (2.) The defendant afterwards attempted to answer our evidence by calling Niles and Walker. If their evidence, when fairly interpreted, does not tend to confirm our proofs, it clearly is not in conflict with the evidence given by the plaintiffs. There was nothing like a serious conflict between the evidence given for the defendant, and that on the part of the plaintiffs; and the judge was clearly right in telling the jury that “the evidence showed a sufficient authority or assent to bind Niles & Wheeler by the signature of Walker to the papers.” Whatever might be the conclusion if the controversy was between the principals and the agent, it is entirely clear that third persons, having no notice to the contrary, might safely regard Walker as the duly authorized clerk or agent of Niles & Wheeler to make bills of lading in their names and business. Even had they given the clerk special instructions not to act in a particular class of cases, it could not affect third persons who had no notice of such instructions.

III. Although the bill of lading, in the events which followed, had the effect of transferring the property without payment, that fact can have no just bearing upon the question of

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authority to make the instrument. (1.) The authority does not depend upon the consequences which resulted from its exercise; and if there had been no previous agreement by Niles & Wheeler to sell the grain, they would be bound by what their agent did in the usual course of his employment, whatever those consequences may be. (2.) But Niles & Wheeler had previously contracted both for the sale of the corn, and its transportation to New York; and the bill of lading was made for the purpose of carrying the contract into effect. (3.) The question is not whether the clerk had authority to sell the corn, but whether he had power to make the bills of lading. (4.) Although Niles & Wheeler intended to keep possession of the corn until it was paid for, their failure to do so cannot affect the question of authority to make the bill of lading. Clearly want of diligence in securing their rights, whether a fault of their own or of their agents, cannot affect the validity of the transaction as against third persons, who have acquired rights under the bill of lading. (5.) We say with great respect, there was a manifest fallacy in the reasoning of the judge on this subject in *Dows v. Perrin*, (16 N. Y. Rep. 325.) But it is enough that this is a very different case *in its facts* from that against Perrin.

IV. Although no one can doubt that Walker had authority to make the bill of lading, the plaintiffs have no occasion to maintain what has been said in the *second* and *third* points. This is not a case, but a *bill of exceptions*, and the exception is to the charge of the judge. What he said on this subject, and all he said, was "that the evidence showed a sufficient authority or assent to bind Niles & Wheeler by the signature of Walker to the papers A, B and C." In this the judge was clearly right. But if he was wrong, it was only a *comment upon evidence*, and for that a bill of exceptions will not lie. (1.) A bill of exceptions must be upon some *point of law* either in admitting or rejecting evidence, or a challenge, or some *matter of law* arising upon facts *not denied*, in which the party is overruled by the court. It does not draw the

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whole matter into examination, but only the particular point to which it is directed. There is no precedent for reviewing on a *bill of exceptions* what the judge may have said *by way of comment upon evidence*. (*Buller's N. P.* 316. *Carver v. Jackson*, 4 *Peters*, 1. *People v. Vane*, 12 *Wend.* 78. *Jackson v. Timmerman*, *Id.* 299. *People v. White*, 14 *id.* 111.) (2.) Had the defendant thought proper, he might have requested the judge to submit the question of authority to the jury; but no such request was made. *He did request* the judge to charge on *another question*, and would undoubtedly have asked the submission of this question, but for the conviction that no jury could hesitate for a moment to find for the plaintiffs. But whatever the reason, it is enough that the request was not made. (3.) It is further stated that the defendant also excepted to said charge on the ground that the question of sufficient authority or assent "*should have been submitted to the jury as a question of fact.*" That was not *a request to leave* the question to the jury, but only a complaint that it *had not been done*.

V. Full effect must be given to the fact, now established, that the bill of lading was made by authority of Niles & Wheeler, and then the case comes to this: *they parted with the possession of the property under a contract of sale*, and though, as against Mack, they might have rescinded the contract, and reclaimed the property on the ground of fraud on his part, they could only do so by acting *before third persons had acquired rights in the property under him*. *As they did not act until after the plaintiffs had become bona fide purchasers for value under Mack*, the title of the plaintiffs cannot be impeached. Had Mack obtained the property by *larceny* or *robbery*, he could not, as against the owners, confer a good title upon any one. But it is otherwise where the owner *voluntarily parts with the possession of the property*, though induced by fraud, either 1, under a contract of sale; or 2, with the usual *indicia* of ownership, or authority to sell. In such cases the person having the apparent right to sell, though he

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obtained it by fraud, or acts fraudulently, may confer a good title by a sale made before the true owner has rescinded the original transaction. A sale brought about by the fraud of the vendee is *not absolutely void*, but only voidable at the option of the vendor. He may elect to confirm or to rescind the contract. But he cannot rescind after a third party has purchased from the fraudulent vendee, for the reason that when one of two innocent persons must suffer by the fraud of a third, the loss shall fall on him who enabled the third to do the wrong. (*Mowrey v. Walsh*, 8 Cowen, 238. *Root v. French*, 13 Wend. 570. *Rowley v. Bigelow*, 12 Pick. 306. *Everett v. Saltus*, 15 Wend. 474, 476, 7; 20 *id.* 267, *S. C.*; 272, *per Ch. Walworth*; 275–280, *per Senator Verplanck*. *Pickering v. Busk*, 15 East, 38. *Kingsford v. Merry*, 34 *Law and Eq. Rep.* 607, 610. *Keyser v. Harbeck*, 3 Duer, 373. *Brower v. Peabody*, 18 Barb. 599; 3 Kern. 121, 126, *S. C.* *Parker v. Patrick*, 5 T. R. 175. *Load v. Green*, *per Parke*, B. 15 Mees. & Welsb. 219. *White v. Garden*, 5 L. and Eq. R. 379. *Stevenson v. Newnham*, 16 *id.* 401, 408.) It will be seen by the last six references, that this rule has been carried so far that one who has obtained the goods by *false pretenses*, amounting to a *statute felony*, can confer a good title, either by selling or *pawning* the property. It will be further seen that *Parker v. Patrick*, though doubted by Denman, C. J., in *Peer v. Humphry*, (2 Ad. & El. 495,) has since been fully confirmed. Though the principle is undoubtedly sound, there is no occasion to go so far in this case; for Mack committed no criminal offense of any kind. His only sin was in not remitting the money to pay for the corn, after obtaining it from the plaintiffs. It may be proper to remark, before leaving this point, that there was no intentional wrong whatever on the part of Bloss, who negotiated the purchase for Mack.

VI. The corn having been consigned to the plaintiffs, and they having advanced money on receiving the bill of lading, and without notice of any fraud on the part of Mack, the right of Niles & Wheeler to stop the goods *in transitu* was at an

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end. (1.) It has been settled for nearly three-quarters of a century that a bill of lading, like a bill of exchange, is in its nature a *transferable* instrument, and that the transfer of the symbol carries the property with it, and puts an end to the right of the consignor to stop the goods on the insolvency of the vendee. (*Lickbarrow v. Mason*, 2 T. R. 63; 6 East, 22, note; 5 T. R. 683; 1 H. Black. 357, S. C.) Also mentioned, 2 H. Black. 211; 5 T. R. 367; 1 Peters, 386, 444, 5; *Conrad v. Atlantic Ins. Co.* There has been some debate in the books on the question whether the instrument is *negotiable* to all intents and purposes, so that the indorsee will acquire *all the rights* which are acquired by the indorsee of a bill of exchange. And it has been said that, though the negotiation of a bill of lading transfers the property, it does not give the indorsee a right of action on the bill. (*Dixon v. Bovill*, per Ld. Ch. Cranworth, 39 L. and Eq. Rep. 52.) However that may be, it is entirely clear that a bill of lading is negotiable for the purpose of passing not only the instrument itself, but the property to which it relates; just as the negotiation of a bill of exchange carries not only the bill, but the debt which it secures. The transfer of the symbol is just as effectual as handing over the property itself. The case, then, plainly falls within the principle asserted in the *fifth* point, and the authority cited in its support. A fraudulent vendee can confer a good title on a *bona fide* purchaser from him; and if he may do that by delivering the property itself, no good reason can be assigned why he may not do the same thing in another way, to wit, by transferring the bill of lading, which has the legal effect of passing the property. (2.) If the English courts are not chargeable with a retrograde movement on this question, they have, to say the least, failed to keep pace with the advance of commerce and the wants of a commercial and trading people. They have said, if not adjudged, that it is not enough that the consignee, factor, or other person holding the bill of lading or other *indicia* of ownership, has the apparent right to sell, but he must also, as between him-

self and the consignor, have the actual right to transfer the property. In other words, that the usual documentary evidence of title, or the right to sell, may be effectually overcome, and the title of an indorsee of the bill of lading or other document, be defeated by some private matter or instructions between the original parties, of which third persons had no notice. In this state of things, so injurious to trade and commerce, parliament interfered, and by several enactments, brought the law up to the usage among merchants, factors, and other agents, and the wants of the commercial world. (3.) In this country the courts have not followed the errors which made legislation necessary in England, but have adapted old principles to the present advanced state of trade and commerce, and the usual course of business in this country. (*Gibson v. Stevens*, 8 How. 384, 398, 400. *Rowley v. Bigelow*, 12 Pick. 306. *Bank of Rochester v. Jones*, 4 Coms. 497. *Grove v. Brien*, 8 How. 429. *Dows v. Greene*, 16 Barb. 72. *Brower v. Peabody*, 18 id. 599.) True this judgment was reversed (3 Kern. 121, 126,) but it was on the ground that the goods were obtained by *larceny*, and not merely by fraud. (*Dows v. Perrin*, 16 N. Y. Rep. 325.) What was said in this case about the negotiability of bills of lading was founded on the English decisions, which no longer give the rule in that country; and, besides, was but *dicta*, the case having before been disposed of on other grounds, and, of course, neither binds that court nor any other. (4.) On the facts, as they must now be taken to be fully established, Niles & Wheeler, the owners of the corn, shipped it on account of Mack, and consigned it to the plaintiffs, who paid their money on the faith of the consignment; and it is impossible to maintain that Niles & Wheeler, (or any person claiming under them,) can defeat the rights thus acquired, by alleging that they were induced to act by the fraud of a third person, of which fact the plaintiffs had no knowledge at the time they received the bill of lading and parted with their money.

VII. Whatever conclusion the court may reach on the com-
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mon law doctrine, which has been considered in the fifth and sixth points, the case plainly falls within, and the plaintiffs are protected by, the 1st and 2d sections of the *factor act* of 1830. (*Laws of 1830*, p. 203, §§ 1, 2. 2 *R. S.* 59, 3d ed.; *Id.* 184, 4th ed.) (1.) The property was shipped in the name of Mack, and consigned to the plaintiffs, who made an advance upon it to Mack, without notice, by the bill of lading or otherwise; that Mack was not the actual and *bona fide* owner of the property. The case is not only within the very words of the act, but is just as plainly within the spirit and policy of the enactment. If the act is not of still wider application, it was clearly designed to protect the consignee in a case like this. To say that the legislature meant less than that, is, in effect, to say that they meant nothing. This question was not touched, or even alluded to in *Dows v. Perrin*. (2.) The cases which have been decided upon the *third* section of the factor act have nothing to do with the present inquiry. (*Stevens v. Wilson*, 6 *Hill*, 512; 3 *Denio*, 472, *S. C.* *Covill v. Hill*, 4 *id.* 323; 1 *Comst.* 522, *S. C.*; 2 *Seld.* 374, *S. C.* *Zachrisson v. Ahman*, 2 *Sandf.* 68.) The *first* and *second* sections of the act were made for the protection of the *consignee*, who has made advances to the person in whose name the shipment was made. The *third* section was made for the protection of those who have dealt with *the factor*, or *other agent*, who has been intrusted with the bill of lading, or other documentary evidence of title.

VIII. There was nothing in the objection that the recovery of damages should be limited to the amount of the plaintiffs' advances. The plaintiffs brought replevin, and the sheriff took the property, whereupon the defendant procured a redelivery, pursuant to the statute. (1.) The plaintiffs were entitled either to the corn itself, or damages to its full value, as *consignees* of the property. (2.) To the extent of their advances the plaintiffs were *purchasers*, and the legal title to the property vested in them to protect their advances. (*Gibson v. Stevens*, 8 *Howard*, 384, 400.) (3.) The equitable in-

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terest in the surplus beyond the advances, does not affect the legal title to the property, which is in the plaintiffs. (4.) That equitable interest, is either in *Mack, Niles & Wheeler*, or *Brainard*; and if the plaintiffs get more than an indemnity, they must account to one or the other of those persons for the surplus. (5.) The defendant Rush is not entitled to the surplus, beyond advances, for two additional reasons—1st. The equitable interest is not, and never was, in him; and 2d. He has not set up any counter-claim in the answer, but relied wholly upon title out of the plaintiffs for his defense. (*Code*, §§ 149, 150.)

IX. Every thing in the motions for a nonsuit is covered by what has already been said, and the judgment of the special term should be affirmed with costs.

By the Court, HOGBOOM, J. As counsel differ entirely as to what questions are open for debate in this case, it will be necessary to look at that point in the first place, in order that we may not waste our time in needless discussion. This is a bill of exceptions, and of course no questions arise save those which are presented upon exception. I find in the case, on the part of the defendant, only an exception on the refusal to nonsuit, repeated at the end of the case, exceptions to the charge and the refusal to charge, and an exception to the rule of damages laid down by the court. These present the only questions which the parties have brought here for examination. I think the exception to the refusal to nonsuit may be very briefly disposed of. By the statement hereto prefixed it is apparent there were facts enough proved to go to the jury on the questions embraced in the motion to nonsuit. Any thing more that needs to be said upon those questions may be just as properly presented in considering the exceptions to the charge. We come then to the charge of the court. The court charged 1st. That the evidence showed a sufficient authority or assent to bind Niles & Wheeler, by the signature of Walker to the papers A, B and C, (the alleged bills of

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lading.) This, I think, is nothing more than a statement of the evidence, or comment upon it, or its effect, or an assumption of a fact in the cause. It is a mere reference to what is established by the evidence. Now it is quite clear that none of these things are the grounds of exception. (*Jackson v. Packard*, 6 *Wend.* 415. *Jackson v. Timmerman*, 12 *Id.* 299. *Nolton v. Moses*, 3 *Barb.* 31. *Barnes v. Perine*, 2 *Kern.* 22, 23. *Beekman v. Bond*, 19 *Wend.* 444. *People v. Cook*, 4 *Seld.* 78. *Hunter v. Trustees of Sandy Hill*, 6 *Hill*, 410.)

A party who is dissatisfied with the expression of an opinion by a judge upon a question of fact, or the conclusion at which he arrives in regard to it, must express that dissatisfaction; not by excepting to the charge of the judge on that point, but by asking to have the question of fact submitted to the jury for their determination. The defendant's counsel claims to have done so in this case, but I think he did not. He simply excepted to the *charge*, on the ground that the question of sufficient authority or assent should have been submitted to the jury as a question of fact. The judge had made no charge to the contrary of this, and there was nothing therefore to which to except; nor had he been *requested* to submit the question to the jury; nor had he *refused* to do so. If he had so refused, the proper exception would have been to *such refusal*. Nor do I think that this *exception* was equivalent to a *request* to the court so to submit, and a *refusal* to do so. It would be torturing language to give it that effect. The most that can be said for it is, that perhaps it ought to be regarded as an exception to what the judge did say upon the subject of sufficient authority as being tantamount to withdrawing it from the judge, although that would be construing language in a rather latitudinarian way. But so construed it is unavailable; for the judge had done no such thing. I am quite aware that this may be argued to be a technical and severe application of the rules of practice, and tending to defeat practical justice. Nevertheless, I understand this practice to be

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well settled and firmly established, and I am by no means sure that the rights of parties will not be quite as well guarded, if the judge who presides at the circuit has his attention invited to the precise thing wanted, or objected to, and the court which reviews his decision is clearly and distinctly apprised of the precise thing which was done on the trial. We are, therefore, to regard these exceptions as out of the case, and as if the judge was justified in the comments he made upon the effect of the evidence. Only two exceptions besides that on the rule of damages remain, to wit: to so much of the judge's charge as states that Niles & Wheeler, and the defendant under them, were estopped from denying, as against the plaintiff, that they held the corn as Mack's agents and carriers, on his account, at the time of the plaintiffs' advances on the faith of the receipts or shipping bills; and to so much of the charge as states that the plaintiffs were entitled to recover the property. It is not quite apparent that these are distinct propositions and not to be read together, and dependent the last upon the first; or that if they are to be treated as distinct, the defendant has made a distinct and separate exception to the three branches of the charge; the two now under consideration and the one previously considered. Clearly a *general* exception is of no avail; the first part of the charge being unexceptionable. (*Murray v. Smith*, 1 *Duer*, 412. *Jones v. Osgood*, 2 *Seld.* 233. *Carpenter v. Stilwell*, 1 *Kernan*, 61.) So, also, the courts have repeatedly held that an exception to the charge, and to each and every part thereof, raises but a single exception to the entire charge, and is unavailable if any portion of it be correct. (*Auth. last cited. Lansing v. Wiswall*, 5 *Denio*, 213. *Caldwell v. Murphy*, 1 *Kern.* 416)

Perhaps the defendant has saved his exception and made it distinct by saying that he excepted to the charge, "and to each part thereof, *separately and distinctly*." (*Dunckel v. Wiles*, (1 *Kern.* 428.) But that is not quite clear. The more appropriate way certainly would have been to have kept

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the several parts of the charge designed to be excepted to "separate and distinct" from each other, and to have applied the exceptions separately to each separate portion, and then there would have been no confusion or doubt. I shall treat the case, however, as if these exceptions were in point of form and regularity sufficient.

Then were Niles & Wheeler and the defendant *estopped* from denying as against the plaintiff that they held the corn, as Mack's agents and carriers, on his account?

We must now assume that the shipping bills, receipts or bills of lading, whatever they may be properly termed, were executed by Niles & Wheeler, and came properly and in good faith into the hands of the plaintiffs. I discover no evidence which, as to the latter, impeaches the *bona fides* of the transaction. The judge undoubtedly assumed that fact in announcing the rule of law which we are now considering. And I think (that being sufficiently apparent) the defendant, if he was dissatisfied, should by specific requests have asked him to discriminate or charge specifically upon the several particulars which together made up the legal proposition which he put forth. (*Barnes v. Perine*, 2 Kern. 22.)

Assuming then that the instruments in question were properly executed, by the owners of the corn, and delivered in good faith to the plaintiffs, who made advances thereon, were they and the defendant, as the master of the boat and their agent, estopped from denying, as against the plaintiff, that they held the corn at the time of the advances as Mack's agents and carriers? In other words, was the title of Niles & Wheeler under the facts proved, such as could be set up against the title of the plaintiffs? for that, I think, was the legal proposition which the judge meant to announce, and not a general abstract proposition having no reference to the facts of the case, whether a party who has once delivered a bill of lading is forever estopped from impeaching it under any circumstances whatever.

To determine this question, let us look briefly at the facts.

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The paper, though informal, was essentially a *bill of lading*. Such has been expressly decided to be its character, in the case of *Dows v. Perrin*, (16 *N. Y. Rep.* 328, 9.) Such also is the liberal interpretation given to papers of a nearly similar character in other cases. (*Dows v. Greene*, 16 *Barb.* 72. *Bank of Rochester v. Jones*, 4 *Comst.* 497.) And it has this peculiar feature: it is not only signed by the owner of the shipping boat, but by the *owner of the goods* or the *vendor* to Mack, under an executory contract of sale. On its face, therefore, it is a certificate from Niles & Wheeler in both of these capacities that the corn was shipped on account of Mack—that is for his benefit, and I think it fairly means for his benefit as the *purchaser and owner of the goods*—to the plaintiffs themselves, as consignees. I think also the fair effect of the evidence of Bloss and Walker is that the bills of lading were delivered to Bloss intentionally and voluntarily without deception or fraud; and therefore that he had lawful possession of them. When he sent them, therefore, to Mack, Mack had lawful possession of them with the consent of the former owners and as apparent owner himself. He had through the bill of lading, the constructive—the legal possession; for it can scarcely be disputed that according to the commercial law the possession of this document of title was equivalent to the possession of the property itself, so far as respects the use thereafter made of it; and the transfer of the one was the transfer of the other. (*Lickbarrow v. Mason*, 2 *T. R.* 63. *Conrad v. Atlantic Insurance Co.*, 1 *Peters*, 386. *Bank of Rochester v. Jones*, 4 *Comst.* 497. *Dows v. Greene*, 16 *Barb.* 72. *Brower v. Peabody*, 18 *Barb.* 599.) It is not necessary to discuss the question whether if this bill of lading did not represent an actual shipment of goods, or if its possession was obtained by fraud, it would destroy the plaintiff's case; for I think neither of these questions arise; nor does it seem to be material to consider whether the execution of the bill of lading *preceded* in point of time the actual shipment of the goods, so long as it represented a real transaction. Were not the

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plaintiffs, then, when on the 8th of August they received in good faith and for advances actually made, the transfer of the bill of lading and of the goods, and in substance the pledge or mortgage or sale of the latter as the security for those advances, brought within the protection of that rule of law which prefers the title of a bona fide purchaser from a fraudulent vendee to that of the original owner. (*Mowrey v. Walsh*, 8 Cowen, 238. *Root v. French*, 13 Wend. 570. *Keyser v. Harbeck*, 3 Duer, 373. *Saltus v. Everett*, 20 Wend. 267.) In the latter case the chancellor says, at page 272: "If the owner of the goods had caused the bill of lading to be made out in the name of Collins, (the alleged fraudulent assignor of the bill,) so as to give him a prima facie right to the goods as owner or consignee for his own benefit, a bona fide purchaser might have been entitled to protection." Up to the time when Mack transferred the bill of lading to the agent of the plaintiffs, no fraud had been committed. That act of transfer was very possibly intended as a fraud upon somebody; although I suppose it not to be unusual in the commercial community to entrust the bill of lading to the intended vendee for the very purpose of enabling him, by a pledge of the same as security, to raise the money with which to accomplish the payment for the goods. I am unable to see that the purchase was *originally* fraudulent, or that the transaction is obnoxious to any other imputation of fraud, than such as arises from a *subsequently conceived* determination not to pay for the goods. It may be said that Mack was not in fact the vendee, but only a proposed purchaser having the refusal of the goods. But I do not think this is sufficient to prevent the operation of the rule. In *Keyser v. Harbeck*, (3 Duer, 391,) it is said: "So if the true owner has entrusted to a third person written evidence of title, or of an absolute and unqualified power of disposition, any one who advances his money to, and obtains possession of the property from, such third person in good faith, relying on the facts being in conformity with this written evidence of their truth, will acquire

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an indefeasible title as against the true owner." (*See also*, 20 *Wend.* 272.) Under such circumstances I do not think there was any substantial error in the charge of the judge that Niles & Wheeler and the defendant were, as against the plaintiff, estopped from denying that they held the corn as Mack's agents and carriers, if by that he intended, as I think he did, that they were not in a situation effectually to dispute the plaintiff's title thus acquired. The result of the whole transaction, taken together, was, as it seems to me, that the plaintiffs were entitled to recover, and so the judge charged. And if he was right on this point, his charge on the question of estoppel may be rejected as immaterial or inapplicable to the facts, and therefore no ground for reversal, as it could work no possible prejudice. (*Lyon v. Marshall*, 11 *Barb.* 241. *Onondaga Co. Ins. Co. v. Minard*, 2 *Comst.* 98. *Shorter v. The People*, *Id.* 193.) Nor does it seem to me to be necessary to discuss the full extent of negotiability that appertains to bills of lading, inasmuch as they are conceded to be so far negotiable, as that in a proper case their indorsement carries with it the title to the document transferred, and the title to the property thereby represented. This is enough for the purposes of the present case; and being so, it is not essential to consider whether the doctrine as to negotiability of bills of lading put forth by the learned justice who delivered the opinion of the court in *Dows v. Perrin*, (16 *N. Y. Rep.* 332 to 335,) is not too much restricted. It does not seem to have been the point in judgment, and therefore conclusiveness as authority will not probably be claimed for it. And lest it should be supposed to command unqualified assent, I would suggest that the doctrine there advanced deserves very grave consideration in the present advanced state of commercial law, and the multiplicity of transactions involving the proper construction of these instruments, before it should be regarded as firmly and incontrovertibly established.

As it is possible we may not have arrived at the correct conclusion upon this point, it is proper to look at this case in an-

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other aspect ; that is, as affected by the factor's act. (*Laws of 1830, ch.179, §§ 1, 2. 2 R. S. 4th ed. 184.*) This act provides, in substance, that every person in whose name merchandise shall be shipped, shall be deemed the true owner thereof, so far as to entitle the consignee to a lien thereon for any money advanced or negotiable security given by such consignee to such first named person. As the corn was shipped on account of Mack, he must, I think, be considered as included within the class of persons first described, and the plaintiffs are, I think, the consignees thereof ; although from the loose manner in which bills of lading are frequently addressed in the margin of the bill, I can conceive that much confusion will sometimes arise in determining who is the consignee, within the meaning of this act. By the second section the lien is restricted to consignees who act in good faith ; and such, as already stated, we must regard the plaintiffs, in this case. They therefore had a *lien*. My principal difficulty upon this part of the case has been whether the statute intended to limit them to the right of detention of the goods when in their actual possession for the enforcement of their lien, or also to authorize an action to obtain possession against a party who claimed them without right or under an inferior title. Strictly speaking, a lien only gives a right of detention and not of acquisition. But if we carry out the established doctrine in regard to these documents, that the possession of the symbol is the possession of the thing itself, like the key of a warehouse, (*Bank of Rochester v. Jones, 4 Comst. 507,*) then we may properly regard the plaintiffs as being in the constructive possession, and as legitimately resorting to this action to perfect and secure their right by reducing the property into actual possession. On the whole this seems to be the better view of this question ; and if so then the plaintiffs had a perfect cause of action under this statute ; and independent of any other question, the judge properly charged that the plaintiffs were entitled to recover.

The only remaining question respects the rule of damages.

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The judge upon request refused to charge that the plaintiffs' damages were restricted to their advances and interest thereon. Strictly speaking, damages in an action of replevin are the loss which the plaintiff has sustained by the detention of the property; except where he is unable to obtain its return. It was evidently *assumed* at the trial that the question presented by this request was the amount for which the plaintiffs were entitled to judgment, and, so considered, the court was right in refusing the request. In an action of replevin, by a party having a lien, the plaintiff, as in other actions of replevin, is entitled to a return of the property, and if a return cannot be had, to its value. (*Wheeler v. McFarland*, 10 *Wend.* 318. *Baker v. Hoag*, 3 *Barb.* 203. *S. C.* 7 *Id.* 113. *S. C.* 3 *Seld.* 557.) The object is to procure a restoration of the possession, and when that is done the lien holder retains the property as a trustee for the general owner, and on being tendered the amount of his lien, is bound to restore the property to him or submit to a proper action for redress.

On the whole case I think that justice has been done, and no legal error to the actual prejudice of the defendant committed; and therefore that the judgment of the circuit court should be affirmed.

[NEW YORK GENERAL TERM, September 20, 1858. *Davies, Sutherland and Hogeboom, Justices.*]

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BUTTERWORTH, receiver of the Island City Bank, vs. W. & J. O'BRIEN.

A corporation cannot recover back usurious premiums paid by it on the loan or forbearance of money..

THIS is an appeal from an order of Mr. Justice SUTHERLAND, made at special term, sustaining a demurrer to the complaint, upon the ground that it does not state facts sufficient to constitute a cause of action. The complaint sets forth

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in due form the appointment of the plaintiff as receiver of the Island City Bank, a banking incorporation, and then alleges that prior to his appointment as such receiver and within one year past, the said bank has paid and said defendants have received on the loan or forbearance of various sums of money, by said defendants to said bank, the sum of \$10,000 in excess of interest over and above the legal rate of seven per cent per annum, which he cannot state with precision or particularity, but charges that the defendants can do so. The plaintiff therefore prays for an accounting, to determine the amount thereof, and judgment for that sum. The complaint also contains a prayer for general relief.

C. A. Peabody, for the appellant. I. The highest rate of interest allowed by law in this state is seven per cent. (1 *R. S.* 772, §§ 1, 2.) All contracts for a higher rate than that are void. Any excess paid above this rate may be recovered back. (1 *R. S.* 772, § 3.) The excess beyond legal interest could be recovered back at common law, without the aid of the statute. (*Wheaton v. Hibbard*, 20 *John.* 290.) This is confessedly the case now as to natural persons.

II. The statute of 1850, which enacts that "no corporation shall hereafter interpose the defense of usury," does not alter the rate of compensation for the use of money, or legalize a contract made by a corporation for a higher rate than that theretofore allowed by law.

III. The "defense" of usury, in that statute means a defense used to defeat a claim for the reason that usury had been reserved, or agreed to be paid, concerning it. A defense to a claim or debt by reason of a taint of usury. This is what was understood and meant by "the defense of usury." It has no other meaning, either in common parlance or in the books.

IV. A corporation, therefore, is only prohibited by this statute, to interpose the fact of usury to defeat a claim, because of the taint of usury. It merely takes from corporations the right to insist on the forfeiture of the debt or claim. The

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statute was penal in its character. It was so as to corporations as well as natural persons. It is so no longer, as to corporations.

V. The statute does not legalize a contract made by a corporation to pay what would be usury, if agreed to be paid by a natural person. The language used would have been far different if that had been intended. It does not repeal the laws against usury, as to corporations. It may, perhaps, be said to repeal the penalties against it, as to them. It assumes the continued existence of usury as to corporations, when it restrains them from interposing it as a defense. The penal feature, or one enforcing a forfeiture, alone is repealed.

VI. There was in existence a system of legislation the purpose of which was to restrict the rate of interest on money. No reference is made to any feature of this system, and no suggestion of an intent to alter this rate. It stands as it was. Seven per cent is still the highest rate allowed by law. An evil was perceived, however, which the legislature proceeded to remedy. It was the use made of the "*defense of usury*" by corporations. Not that the rate of interest as to them was too low, or should in any manner be altered. No suggestion was made of this kind. But the *use made of the "defense of usury,"* was the evil to be avoided and to which the legislature addressed itself when this statute was enacted. (*Curtis v. Leavitt*, 15 N. Y. Rep. 1.) These views are the same as those expressed in *Curtis v. Leavitt*, (1 N. Y. Rep. 1; *see opinion of Paige*, p. 229.) He puts his decision of the question of the constitutionality of the law of 1850 as to contracts previously entered into, on the ground that the law as it stood before was penal, and to warrant his decision on that ground he must have limited the operation of the act of 1850 to that feature of the law or that use of the defense, that the act of 1850 only affected it in its penal feature. So in speaking of the effect of the statute of 1850. He treats only of *the defense of usury*, and of that as operating to cause a forfeiture; and treats the repeal (as he terms it) of the former laws as extending only

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to the penal effect of the statutes. (*See p. 229.*) The question there necessary to be decided was whether the prohibition against that defense, as to corporations, related to contracts made before the law of 1850 was passed; and if so, whether it was valid as to such contracts. Shankland, J., p. 173, speaking of this law of 1850, says, it does not impair the obligation of a contract, but merely deprives "*the borrower of a defense in the nature of a penalty or forfeiture;*" and therefore, he says, that it may apply to prior contracts without the constitutional objection as to vested rights. (*See also opinion of Brown, J., p. 151, 2.*) He calls the law, which the statute of 1850 prohibits corporations to avail themselves of, "severely penal in its provisions." He speaks of the "penal and savage nature of the act," and proceeds to say that the retrospective character of the act does not make it void, because the rights which it took from the corporations were of the nature of a penalty; not vested and of perfect obligation. That case proceeds on the idea that the statute of 1850 affects only the penal feature of the law; and all the opinions proceed on that idea. In any other view it must, under the course of reasoning adopted there, have been adjudged as to that case unconstitutional as operating to divest a vested right. The result of that case is that the constitutionality of the law was sustained as to the contract in question made prior to the passage of the law, because it only took away the right to claim a penalty.

VII. The complaint, as a pleading, is good. If it be indefinite, a demurrer is not the remedy. The remedy is by motion, that it be made definite under § 160 of the code. Every fact necessary to a recovery is stated here. (*Prindle v. Caruthers*, 15 N. Y. Rep. 425. *Allen v. Patterson*, 3 Selden, 476. *Eno v. Woodworth*, 4 Comst. 249. *Richards v. Edick*, 17 Barb. 260.) A demurrer will not lie for uncertainty.

VIII. A defect in the prayer, or a supposed prayer for relief, is no ground for demurrer. The plaintiff is to be adjudged any relief to which he shows himself entitled. (*Code*, § 275.

Marquat v. Marquat, 2 *Kernan*, 341. *Bishop v. Houghton*, 1 *E. D. Smith*, 566. *Andrews v. Shaffer*, 12 *How. Pr.* 443.)

Waldo Hutchins, for the defendant. I. A conclusive answer to this action is, that it is brought *in fact* by a corporation; which is prohibited, by statute, from interposing the defense of usury in any action. (*Laws of 1850, ch. 172.*)

II. Had an action been brought by the defendants against the bank, upon an evidence of indebtedness, including interest at a greater rate than seven per cent, the bank could not have set up the defense of usury. The plaintiffs in that action would have recovered the full amount. But if this action can be maintained, in the case supposed the bank could at once have turned round and sued the O'Briens in the same court in which the original action was brought, and have recovered back a sum of money which had previously, by the judgment of the same court, been awarded to the O'Briens; thus indirectly doing what could not be done directly. This would controvert well established principles of law, and lead to a multiplicity of suits; which the law will not tolerate.

III. The law of 1850 leaves parties, when dealing with corporations, to make their own bargains as to the rate of interest; and when a contract is made, the corporation is *prohibited* from interposing the defense of usury, in any action. Such has been the effect given to the statute. Many of the rail road corporations in this state have issued bonds bearing a greater rate of interest than seven per cent; or if not bearing a greater rate of interest than seven per cent, such bonds have been sold at rates greatly below par, thus indirectly allowing more than seven per cent interest. To allow this action to be maintained would be to allow, in all such cases, an action to be maintained by every company, to recover back the excess beyond seven per cent, whenever it was paid. Although this question has not been definitively passed upon by the courts, still it has been, in effect, decided in the case of *Curtis v. Leavitt*, (15 *N. Y. Rep.* 1.) Judge Comstock, at page 85, says: "My im-

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pression is, that the act must be construed as a *repeal* of the statute of usury, as to all contracts of corporations, stipulating to pay interest; thus leaving the contracts in full force according to their terms, and that such an act is liable to no constitutional objection." If this be so, then it is an end of this case. But, besides, there was no law in force at the time the contract was made between the bank and the O'Briens, which made it an illegal contract. Then how, or upon what ground, *after* the money has been paid, can an action be maintained to recover it back?

IV. Again; the complaint is defective in this, that it does not set out, distinctly, the terms of the usurious contract. In *Vroom v. Ditmas*, (4 *Paige*, 526,) the chancellor states the rule to be as follows: "The defense must be *distinctly* set up in the plea or answer, and the terms of the usurious contract, and the *quantum* of the usurious interest or premium must be specified and distinctly and correctly set out, and the defendant must prove the usury as laid." The same rule also applies to a substantive cause of action. (See 8 *Paige*, 457; 3 *Hill*, 564.) The allegation in the complaint is that the defendants received "at least the sum of \$10,000," &c. and then the plaintiff distinctly avers "that he cannot state the precise amount of such excess," &c.; and he goes on to state that the defendants can inform him, and prays for an accounting. To allow this action to be maintained would violate all rules of pleading applicable to actions brought upon usurious contracts.

By the Court, HOGEBOM, J. This case presents the question whether a corporation may recover back usurious premiums paid by it on the loan or forbearance of money. It involves the construction of the act of 1850, which is as follows: "No corporation shall hereafter interpose the defense of usury in any action." (*Laws of 1850, ch. 172, § 1.*) Our statute forbids any person or corporation, directly or indirectly, to take any greater sum than at the rate of seven per cent per

annum for the loan or forbearance of money, (1 *R. S.* 771, 2, §§ 1, 2,) and as a consequence of, or penalty for, the violation of this statute, authorizes any person paying such larger sum to recover back such excess, if the action be brought within one year after the payment. (§ 3.) The benefit of this latter section (prior to the act of 1850) probably attached to corporations, although it is observable that the *second* section, which forbids the taking of usury, uses both the words "person" and "corporation," and extends the prohibition to both; whereas the *third* section, which authorizes a suit to recover back the usury, uses only the word "person," and not "corporation." Subsequent sections of the statute declare void all bonds, notes, contracts and evidences of debt reserving any usurious premium (§ 5;) authorize the prosecution thereof to be restrained by injunction, (§ 14;) and make the taking of usury a misdemeanor. (§ 15.) In this shape, the statute against usury, as amended in 1837, remained until the act of 1850 was enacted, which simply provided that "no corporation should thereafter interpose the defense of usury in any action." This statute, like every other of general application, should receive a construction in accordance with the intent of its framers and in furtherance of the object sought to be accomplished. It was probably intended, in part at least, for the *benefit* of corporations, to enable them to obtain, in critical emergencies, pecuniary facilities for the promotion of the objects of their incorporation. They are forbidden to interpose the *defense* of usury; and therefore when prosecuted upon a usurious contract, they were bound to pay or suffer judgment against them. And I think the fair construction of the statute is that they were bound to pay, not only the sum actually borrowed, with legal interest, but also the *usurious premium*. The law creates no distinction between the sum actually borrowed with interest, and the *excess* over seven per cent. It declares that they shall not interpose the *defence*—the defense for *any purpose*. What they have *agreed* to pay, they must pay. The contract is made *legal* as to

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them, by removing every legal obstacle to a recovery against them. Hence evidences of debt securing or reserving as against them what would otherwise be an usurious premium are not void or illegal, but are lawful, and the whole amount may be recovered in an action. If so, then I think it cannot subsequently be recovered back. It would contravene well settled principles, and all legal simplicity, first to allow a recovery of the usury, and then to allow it to be immediately recovered back. I do not understand that the law allows such a thing to be done now in the case of natural persons, as to whom the laws against usury are in nowise repealed or modified. They may recover back money actually paid by way of usury, first, because the agreement to pay and the act of payment are illegal transactions, and secondly, because the law presumes that the urgency of their pecuniary necessities may have left them no practical option, except to obtain the money at the time of the original loan, on such terms as they could. But if actually prosecuted on the usurious contract, I know of no law or legal rule by which they may suffer a recovery and then turn immediately round and by a prosecution on their part get back money, as to which they had a legal and valid defense against its recovery, when originally prosecuted. If these views are correct, they dispose of this case. If a suit for the usurious premiums could not be successfully defended, neither can they be voluntarily paid, or compulsorily collected, and then be restored to the party originally paying them, through the agency of a suit instituted for that express and only purpose. Such is this suit, and it must fail, for the reasons stated.

Again; the only just or legal foundation (prior to the statute of 1850,) for the suit to recover back usurious premiums paid, was the *illegality* of the original transaction—the fact that the *receipt* of the money by the usurer was *forbidden*. But the statute of 1850, by prohibiting the defense, has removed the *taint* of usury. It is no longer, as to corporations, *illegal*. It has become a lawful and proper transaction. Hence the *reason* of the rule which allowed the action to recover

back the money fails. The illegality being removed, the foundation for the action no longer exists.

It is argued, that this is giving the statute of 1850 a more extended meaning than was designed by its framers—that it was only intended to take away the *defense* of usury—to prevent the *avoidance* of a contract otherwise valid, for that cause; and not to pronounce usury lawful, or to repeal the law which forbids it. It is argued that full effect may be given to the statute of 1850, by preventing a party from defeating a contract on account of usury, or from setting it aside and canceling it in a court of equity; and that this is the more benign and equitable construction, and most consistent with the spirit of the law, inasmuch as it compels a party to do just what is equitable, to wit, to pay the money actually borrowed and legal interest, and relieves him from what is inequitable, oppressive, and against the policy of the law.

But I do not find sufficient foundation in the phraseology of the law, upon which to build such a construction. The language is general and unqualified. It takes away the defense—the *objection* of usury. It strikes it out of existence, and the ordinary consequences must follow. It not only disallows the defense, but it forbids it to be used in any way defensively; that is, to accomplish the same object by affirmative action, as, for example in a proceeding to vacate or set aside a contract, as would be accomplished by strictly defensive action, as for example, in setting up the usury in an answer to an action upon the contract. If it goes this length, and it was rather conceded on the argument that it did, then I think it goes still further, and forbids not only a defense to an action for the usury or usurious premium, but forbids an action to recover back the usurious premium. The money borrowed, the legal interest, and the usurious premium are all mingled together in one transaction, form part of one single and indivisible contract, and when the statute says the defense of usury shall not be interposed to it, I think it means to each and every part of it—no one part more than another. At least I

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feel bound to put that construction upon it, until the legislature speak in more specific and discriminating terms.

I think this view of the statute of 1850 is taken, in substance, by all the judges in the court of appeals who delivered opinions in the case of *Curtis v. Leavitt*, (15 *N. Y. Rep.* 9. See opinion of Comstock, p. 85; of Brown, pp. 152-154; of Shankland, p. 173; of Paige, pp. 228-230; of Selden, pp. 254, 255.)

The result is, that the complaint is radically defective, and cannot be sustained. It becomes unnecessary, therefore, to consider the other question discussed on the argument, whether the usurious transactions were set forth with sufficient particularity and precision to uphold the complaint as a pleading.

The order of the special term should be affirmed, with costs.

[NEW YORK GENERAL TERM, September 20, 1858. *Davies, Sutherland and Hogeboom*, Justices.]

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VANDERPOOL *vs.* HUSSON, COIT and MORRISON.

In an action to recover damages for the defendant's neglect in conducting the repairs of a house, in consequence of which the plaintiff, while passing by, was struck by a falling timber and injured, where the defense is, negligence on the part of the plaintiff contributing to the injury, and the absence of negligence on the part of the defendant, the true question to be put to the jury is, Did the defendant take proper precautions to prevent the injury; in other words, was he guilty of negligence in not observing proper precautions?

It is error, in the judge, to *limit* the expedients to be resorted to by the owner of the building, by instructing the jury that where, in conducting such repairs, a derrick is necessarily extended over the side-walk where people are passing, it is the duty of the owner to cause a barricade to be placed, to prevent people from passing by; or to place a person there, to give warning to passers by.

The general rule is that where work is done under a contract, and an injury to an individual occurs from the act or negligence of the servants of the contractor, the owner of the property is not responsible.

To this general rule there are exceptions; as where the work or erection is itself a *nuisance*; or where the injury was a necessary result of the contract, &c.

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THIS was a motion for a new trial, on a case and exceptions ; the motion having originally been made at special term and denied, and coming here by appeal. The suit was brought to recover damages for the defendants' neglect in conducting the repairs and improvements of a house at 108 Bowery, New York, in consequence of which the plaintiff, in passing by, was struck by a stick of falling timber and had his leg broken, and was otherwise injured. The defense was negligence on the part of the plaintiff, contributing to the injury, and the absence of negligence on the part of the defendants ; and also that the repairs and improvements were conducted by Morrison as a contractor or sub-contractor under one Berry, with whom Husson as the owner of the premises, and Coit as his agent, had made a contract for doing the work ; and that the workmen through whose alleged negligence the injury was occasioned, were the servants of Morrison alone and not of the other defendant, and therefore that the latter were not responsible. This relation of the parties was substantially proved, at the trial, but the plaintiff gave evidence tending to show to some extent that Husson and Coit had superintended the work, given orders to the men engaged in it, and issued directions to the workmen, which were in some instances complied with and obeyed. Evidence was also introduced upon the point whether there was or was not a barricade timber extending across the side-walk and elevated above the pavement to prevent persons from passing by, and also whether a person was stationed at or near the place to give warning of danger to persons approaching ; and whether this warning was in fact given in this particular case. Evidence was also introduced to show that a *derrick* was erected and used in the performance of the work, which occupied a part of the pavement or side-walk in front of the premises. Much additional evidence was given, not material to be noticed. The judge charged the jury at length, and the defendants took various and specific exceptions to portions of the charge. They also made various requests to charge, with some of which the judge refused to comply, and the defendants duly excepted.

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These are sufficiently referred to in the opinion of the court. The jury rendered a verdict for the plaintiff for \$4500, and the defendants brought the case here by appeal from the decision of the special term refusing a new trial.

D. Dudley Field, for the defendants.

W. Curtis Noyes, for the plaintiff.

By the Court, HOGEBROOM, J. The judge at the circuit, among other things, charged the jury that if an owner of a building contracts with another to raise a roof to his house, and in that work a derrick is employed, extending over a sidewalk which is a great thoroughfare, where many persons are continually or frequently passing, and that derrick was necessarily so extended, or it was known to the owner that it was so extended, or would be extended, then it was the duty of the owner to cause a barricade to be placed to prevent persons passing by, or to place a person there to give warning to the persons passing, and for the omission of such duty the owner is liable as for his own neglect. To which charge the defendant's counsel excepted.

In this charge I think the learned judge erred. The general rule is, that where the work is done under a contract, and the injury occurs from the act or negligence of the servants of the contractor, and not those of the owner, the owner is not responsible. (*Blake v. Ferris*, 1 *Selden*, 48. *Pack v. The Mayor &c. of New York*, 4 *id.* 222. *Kelly v. Mayor of New York*, 1 *Kern.* 432. *Norton v. Wiswall*, 26 *Barb.* 618.) There are exceptions to the general rule, where the work or erection is itself a nuisance, or where the injury was itself a necessary result of the contract, and in some other cases not material to be noticed. (*Stevens v. Armstrong*, 2 *Selden*, 436. *City of Buffalo v. Holloway*, 3 *id.* 493. *Mayor of New York v. Bailey*, 2 *Denio*, 442. *Congreve v. Morgan*, 5 *Duer*, 495.) This particular erection was not complained of as a nuisance, nor

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was it necessarily of that character. A temporary obstruction of the side-walks or avenues of a city is sometimes indispensable to the erection of such buildings or the making of such repairs and improvements as are essential to the comfort of the inhabitants. Nor is it quite clear that the *derrick itself*, in consequence of its position and dimensions, might not answer all the purposes of a barricade, and strike the eye and catch the attention of passers by, so as perhaps to give more timely and effectual warning than the stick of timber relied upon in this case to perform that office. But assuming it to be otherwise, and that prudence required other precautions to prevent danger to persons passing by, I am of opinion that the judge restricted too much the expedients to be resorted to, to produce this effect. It is quite possible that other things might be done to inspire precaution, or give warning, quite as effectually as the placing of a barricade across the walk, or stationing a person there to give warning. The party charged with such a duty might post a notice in some conspicuous place, or across the walk itself, or do various other acts, which would just as well accomplish the object desired. The true question to be put to the jury was, did the owner take proper precautions to prevent the injury; in other words, was he guilty of negligence in not observing them? To *limit* the defendant to the two particularly named, was, I think, calculated to mislead the jury.

In a subsequent part of the charge, the learned judge seems to have fallen into the same error, and to have prescribed precisely the same means of warning as the only ones that could admonish the passer by of danger; and he expressly charges that the individual passing may assume that it is safe for him to pass, unless he is notified to the contrary in one or the other of the two modes above referred to. I can only repeat that this seems to me to confine the proof of the absence of negligence within too narrow a compass. I do not know that in point of fact it was pretended that any other special means than those thus specifically referred to by the court were resorted

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to to admonish passers by of danger ; but still the question of negligence is one to be gathered from all the circumstances of the case, and the defendants had a right to the benefit at the hands of the jury of the consideration of all these various circumstances in making up their opinion on this question.

There are other questions in the case deserving of consideration, but I have not thought it necessary to pursue them. If I am right in the view thus far taken, there must be a new trial granted, with costs to abide the event. And I am of opinion that justice requires that such direction should be given to the case.

[NEW YORK GENERAL TERM, September 20, 1858. *Davies, Sutherland and Hogeboom, Justices.*]

JONATHAN PEEL, Her Britannic Majesty's Principal Secretary of State for the War Department, *vs.* JAMES SUTTON ELLIOTT.

Proceedings had in England, under a *writ of extent* issued out of the court of exchequer, against an individual, for embezzling or fraudulently misapplying the public money, which result in the finding, by the inquisition of a jury, that a specified sum is due from the defendant, to the British government, will not have the effect to waive, or merge or extinguish the original claim ; so as to prevent the bringing of an action thereon, in this state, and the *arrest* of the defendant under the provisions of sub. 2 of sec. 179 of the code, authorizing defendants to be arrested in actions to recover money or property embezzled or fraudulently misapplied by a public officer.

Such extent and inquisition, amount to nothing as a *cause of action*, here ; and being ineffectual for that purpose, they are also ineffectual to deprive the creditor of the benefit of the circumstances under which the original cause of action arose, and the provisional remedies applicable thereto.

THIS was an appeal by the defendant from an order of Justice DAVIES, refusing to vacate or discharge an order of arrest originally granted by Justice INGRAHAM. The latter

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order was granted on the 15th day of July, 1858, at the time of commencing this action, simultaneously with the issuing of the summons, and was founded upon an affidavit of the plaintiff's attorney of the facts entitling the plaintiff thereto. A motion to vacate the order of arrest was made before Mr. Justice Ingraham, based upon the supposed insufficiency of the affidavit before referred to, which motion was denied, with liberty to renew the same on affidavits on the part of the defendant. The defendant availed himself of this privilege and renewed the motion to discharge the order of arrest before Mr. Justice Davies, upon his affidavit and the papers before used, and the same was met by counter and additional affidavits on the part of the plaintiff. The case presented substantially the following facts: The defendant was, on and prior to the 20th day of May, 1858, Her Britannic Majesty's principal military storekeeper at Weedon, England, and as such was charged with the disbursement and payment to the persons entitled thereto, of various large sums of money from time to time entrusted to him for that purpose by the war department, of which the plaintiff was the principal secretary of state, and as such secretary having or claiming the care and custody of the property of that department, and the right to prosecute in his own name any action or proceedings for or concerning the same. A portion of the moneys thus entrusted to the defendant, he failed to disburse and pay over, according to law, and appropriated them to his own use, under pretense of satisfying a claim which he alleged he had against the department for arrears of pay, fees and perquisites, and which he claimed to have a legal right thus to satisfy. On the contrary the plaintiff claimed that this amounted to an embezzlement and fraudulent misapplication of those funds by the defendant as a public officer, and a fraudulent conversion of the same to his own use. The defendant having left or absconded from England about the 20th of May, 1858, and come to this country, a paper supposed in these proceedings to be a *writ of extent* was sued out by her majesty in the court of exchequer, directed to

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certain commissioners therein named to inquire through a jury and witnesses whether the defendant was indebted to her majesty for any sums received by him as such military storekeeper, for her majesty's use and not paid over, and if so, in what sums, and duly to take an inquisition thereof and return the same to the court of exchequer. By the same writ the sheriff of Middlesex was commanded to summon the jury for such purpose. To this writ the return of the commissioners and the inquisition are annexed. By the latter it is found that the defendant "James Sutton Elliott, late of Weedon, in the county of Northampton, principal military storekeeper in the war department in the said commission also named, is, on the day of taking this inquisition, justly and truly indebted to her majesty in the sum of £2223 00 3 for money received by the said James Sutton Elliott for her majesty's use, and which he, the said James Sutton Elliott, should have appropriated in payment of various sums due on her majesty's account, but which the said James Sutton Elliott had neglected to do." These last facts as to the aforesaid commission, the return and inquisition, appear by an exemplified copy thereof under the seal of the court of exchequer, and said papers are described in such exemplification as "a certain record remaining amongst the remembrances of our court of exchequer at Westminster, that is to say, amongst the records of Trinity term, in the twenty-first year of the reign of Queen Victoria."

The complaint in this action, which was verified on the 10th of August, 1858, after setting out the title of the plaintiff and his right to sue for the cause of action therein set forth, alleges the appointment of the defendant, in October, 1855, as a public officer in the war department, to wit: principal military storekeeper in the said war department at Weedon, and his continuance in said employment till about the 20th of May, 1858, when he absconded therefrom; that he was, as such storekeeper, entrusted with divers property of said department, and especially with divers large sums of money for payment to the persons entitled thereto, a portion of which

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he neglected so to pay or apply, and did, on or before the 20th day of May, 1858, fraudulently and wrongfully, and with misconduct and neglect of the duties of his said office, embezzle and misapply and convert to his, the said James Sutton Elliott's own use and purposes a large sum of money part of such moneys so entrusted to him as aforesaid, to wit: the sum of £2223 00 3, currency of the said united kingdom of Great Britain and Ireland, the same being of the value of \$10,818.66 currency of the United States of America," in fraud of the department and in breach of his duties as such public officer, and fraudulently and wrongfully misconducted himself and absconded from the duties of his office without discharge therefrom, and without applying or accounting for said money, and that he has never since applied the same or accounted therefor.

The complaint then states that on such embezzlement and absconding a writ of extent was duly issued and an inquisition was also taken under such extent in due form of law, whereby the defendant was found indebted (substantially as set forth in said inquisition,) as appeared by an exemplification of the said extent and inquisition under the great seal of the said court of exchequer, to which he craves leave to refer. It then sets forth that the defendant has never repaid, applied, or accounted for the said sum, but is indebted to the plaintiff therefor with interest from the 12th day of June, 1858, the date of the said inquisition, and demands judgment for that sum with the costs of the action.

The defendant details in his affidavit the circumstances under which he became entitled, as he alleges, to the fees and perquisites exceeding the amount of the plaintiff's claim, and which he applied in satisfaction thereof, and claims the right to apply in this action as a set-off or counter claim thereto. The plaintiff's affidavits sufficiently substantiate the relation of the parties, the deficit in the accounts and the misappropriation of the moneys. The only question argued upon the appeal was whether this was properly an action for money received or property embezzled or fraudulently misapplied by a

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public officer in the course of his employment as such, or by a person acting in a fiduciary capacity, or for misconduct or neglect in office, or whether the original cause of action, assuming it to have been such as would have justified an order of arrest, had been waived, merged or extinguished by the proceedings taken in England under the extent and inquisition.

C. A. Seward and A. Oakey Hall, for the defendant.

J. T. Williams and H. Whitaker, for the plaintiff.

By the Court, HOGEBOM, J. The question presented for the consideration of the court in this case is, whether the defendant ought to remain under arrest within the provisions of subdivision two of section 179 of the code. That section authorizes the arrest of a party in an action for money received or property embezzled or fraudulently misapplied by a public officer, or by a person in a fiduciary capacity, or for any misconduct or neglect in office. The question was argued wholly upon the effect of the judicial proceedings taken in England upon the case, and I do not therefore propose to discuss the question whether the defendant, for acts done in England, amounting to fraud or official misconduct towards that government, can be held to arrest here as a public officer, or guilty of official misconduct; or whether our statute is limited in its operation to cases of misconduct occurring within its own jurisdiction or towards its own government. The precise question to be disposed of therefore is, whether the legal proceedings which have taken place in England have essentially altered the original cause of action and so deprived it of its original character or qualities, that in its present shape the action can no longer be said to be an action for money received or property embezzled or fraudulently misapplied by the defendant as a public officer, or for misconduct or neglect in office. This must be determined by ascertaining the legal characteristics of the cause of action on which the plaintiff

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must rely for a recovery in the form of action which he has adopted. I say the cause of action *on which he must rely for a recovery*, rather than the cause of action *on which he has prosecuted or which he has set forth in his complaint*; for if all the facts as now developed, show that he must rely upon the extent and inquisition, and that he cannot go back to the original official misconduct as the ground of recovery, then we must look at the extent and inquisition and determine whether they have so far altered, merged or extinguished the original cause of action as to deprive it of those properties upon which the right to obtain an order of arrest is founded. We are driven therefore to investigate the character and effect of the proceedings in England, in order to determine this motion. These proceedings are denominated in the complaint in this action a writ of extent and an inquisition thereon, but I think improperly so. They are merely the commission and inquisition which are resorted to in England as preliminary to, and the foundation of, the writ of extent and inquisition which are subsequently issued and taken. So far as I have been able to gather or understand the practice in England upon this subject it is this.

When the queen desires to recover a simple contract debt against a subject, she may proceed by action of *debt*, or by a *scire facias* or *extent*; but writs of *sci. fa.* or *extent* must be founded upon *matter of record*, and therefore before proceedings can be taken to collect a simple contract debt, it must be *entered of record*. (2 *Tidd's Pr.* 1092. *Regina v. Ryle*, 9 *Mees. & Wels.* 239.) To put the simple contract debt in this shape, a *commission* is issued out of the court of exchequer, directed to two commissioners, and always executed in Middlesex, to inquire as to the indebtedness and its amount, under which an *inquisition* is taken to *find the debt*. When thus taken, returned and filed, it becomes *matter of record*, and the proper foundation upon which a *writ of extent* issues. It is precisely this, and no more, which has been done in the present case, according to the exemplified proceedings which

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are presented on this motion. No notice to the defendant is given of the execution of this commission, and none was given to the defendant in this case; and generally no evidence is given of the debt in these preliminary proceedings, except the *affidavit of danger* which is made for the purpose of procuring the *writ of extent* which is the next proceeding. (2 *Tidd's Prac.* 1093.) This affidavit states the existence and origin of the debt and that it is in *danger* of being lost, in consequence of the defendant's insolvency, bankruptcy or *absconding*, or other act leading to a like conclusion; then a *fiat* issues for a writ of extent, signed by the chancellor of the exchequer or a baron, and upon this, (after the preliminary inquisition is returned and filed,) the *writ of extent* issues. This writ when issued to collect a debt due to the queen, (as it would be in the present case if the proceedings were continued in England,) is called an *extent in chief*. When issued, as it sometimes may be, in behalf of the *crown debtor*, (though in the name of the king or queen,) against *his* debtor, it is called an *extent in aid*, because its object is to *aid* in obtaining payment of the debt due the crown. This writ is directed to the *sheriff*, and commands him to enter same and take defendant, and to *inquire* by a jury what lands and tenements, goods and chattels, and *debts*, the defendant has, (or had,) and to *appraise* and *extend* the same, and take and seize them into the king's (or queen's) hands. (2 *Tidd's Prac.* 1094. *Sewell on Sheriffs*, 264. *Watson's Sheriff*, 247.) Under this writ an *inquisition* is taken in obedience to its injunctions; and on its execution all parties interested may appear and give evidence, and sometimes the court is applied to, to require reasonable notice of its execution to be given, although no notice is given in ordinary cases. As yet it will be observed there is no command to *sell* the property seized. Therefore, on the return day of the writ of extent, a rule is entered that if no one *appear* and claim the property of the goods in a se'nnight, a writ of *venditioni exponas* shall issue to sell the same. (2 *Tidd*, 1115. *Sewell*, 281.) If there is no appearance the

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property is sold under the last named writ. If the *defendant* (or other parties interested in the property,) *appear*, as he may do, he may oppose the proceedings, which is done principally in two ways: either by a motion *to set aside* the proceedings, if there are legal objections thereto, or by a *traverse*. On a traverse the party enters his appearance and claim of property; then a *rule to plead* is entered, and the defendant puts in his *pleas*, which may contain any matter of defense, and among others, that the debt does not exist, or has been in some way paid or satisfied. To these pleas a replication (if necessary,) is interposed, and on an issue being formed, the cause goes to trial in the ordinary way before a jury. (2 *Tidd*, 1124 to 1128.) A *postea* is made up and a *rule for judgment* entered. In practice, except where the defendant wishes to bring a writ of error, a *judgment* is seldom entered up when the verdict is in favor of the crown; as the latter is already in possession of the property under the writ of extent. Nor does an *execution* issue, the cause being left to take the same course as if no appearance or claim had been put in. If the defendant succeeds on the trial, he is restored to the property by a writ of *amoveas manus*. (2 *Tidd*, 1128, 1129.)

This brief recital of the English practice will help materially to illustrate this case. The proceedings in England so far as they have taken place, are only preliminary in their character—entirely *ex parte*—and only resorted to as the foundation for a proceeding peculiar to England, at any rate wholly unknown to us under our present system; to wit, the *writ of extent*. It is possible that in England, an *action* of debt might lie in behalf of the crown upon the debt *thus found* by these preliminary proceedings, as it would lie upon the simple contract debt existing before the proceedings were initiated. I do not know whether this is so or not. But if it be so, I should have some doubt, if England had a statute like ours in regard to arrest, whether the character of the claim would be thereby so entirely metamorphosed, as to forbid an arrest. I should think it certainly would not be, if the plaintiff had his *election*,

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either to sue upon the original simple contract debt, or the debt of record, which was the result of the preliminary proceedings. There would have occurred no *satisfaction* of the debt, no voluntary change by the mutual consent of the parties of the character of the debt, no particular equity for depriving the plaintiff of his original remedies; nothing indeed occurring but a proceeding which gave greater certainty, precision and permanency to the debt. Still if the plaintiff was restricted to his remedy upon the debt of record, it might well be said his *cause of action* was not the same as at first. In the first proceeding he would be obliged to proceed upon the original cause of action, the simple contract debt. In the other case, he would be obliged to proceed upon the *record* debt, and would neither be required or allowed to go back to the original cause of action. But taking the facts of this case, I do not see how he could found an effectual or conclusive cause of action upon an *ex parte* proceeding. It is, as to the defendant, as if it had never taken place. I know of no transaction upon which a right of action against another can be founded, unless he has in some way become a party to it, or unless in some legal proceeding jurisdiction of his person had been obtained. Even, therefore, if the action had been prosecuted in England under a statute similar to ours, I think the plaintiff could not rely for a recovery upon what are (erroneously) called in this case the extent and inquisition, for the reason that the proceeding was wholly *ex parte* and liable to a jurisdictional objection. He would be driven therefore to his original cause of action.

But in this state we have no *writ of extent*—no proceedings in any way analogous; and the plaintiff institutes the ordinary action to recover his debt. In his complaint it is very apparent that he sets forth all the facts, independent of the extent and inquisition, which he would have set forth if he had been suing upon the original cause of action alone. But he sets forth also the extent and inquisition; not, as on this motion he alleges, as the substantive cause of action, but as a fact

in the history of the cause of action, giving at most precision and certainty to his claim, and furnishing a date from which to charge interest. On the other hand, the defendant claims, that it is put forth as the real and substantial cause of action, the *record* on which the plaintiff relies for a recovery; and that the other allegations are only by way of introduction or inducement. But it is clear to my mind that it is not a *record*, in the ordinary sense of that term; that is, a matter conclusive upon the parties, incapable of contradiction, and importing absolute verity. In a restricted sense it is a *record*, like a recorded mortgage or a recorded deed; that is, it is entered of record. But it has not even the force of a recorded deed or mortgage, for they purport to be the act and to bear the signature of the adverse party; whereas this is a wholly *ex parte* proceeding, and would have no more inherent force than a *judgment, decree or record*, made up on the party's own motion, without notice to the adverse party, in a case where the practice of the court required the facts in the complaint to be verified by a disinterested witness. I think such a proceeding, independent of a statute giving it efficacy, can have no such force by the principles of the common law, as a substantive cause of action, as would allow of its being declared on as such, or as having inherent vitality independent of the aliment or support it derives from the original cause of action. If this be so, then the (so called) "extent and inquisition" amount to nothing as a *cause of action*; and if they are ineffectual for that purpose, they are also ineffectual to deprive the plaintiff of the benefit of the circumstances under which the *original* cause of action arose. In other words, the plaintiff has not, even if he originally attempted to do so, succeeded in so altering, merging or extinguishing his original claim, as to give it a new character or make it a new thing. The present action is still an action to recover money or property embezzled or fraudulently misapplied by a public officer; or for misconduct or neglect in office.

Warwick v. The Mayor &c. of New York.

The result at which I have arrived upon this part of the case, contrary, I am free to say, to my original impressions, makes it unnecessary for me to examine the question whether in case the plaintiff had succeeded in transforming his original claim into a *judgment*, he would thereby have forfeited the right to arrest the defendant incident to his claim in its original character. Upon that subject the authorities, so far as they have gone, are conflicting. Justice Mitchell of the supreme court, in *Goodrich v. Dunbar*, (17 Barb. 644,) maintains the affirmative of this proposition; while Justice Woodruff of the superior court, in *Wanzer v. De Bawn*, (1 E. D. Smith, 261,) as strenuously upholds the negative. I do not think the present case calls for a decision of that question.

I am therefore of opinion that the defendant is not entitled to be discharged from arrest upon the ground argued before us on the appeal, and that the order of the special term should be affirmed with costs.

[NEW YORK GENERAL TERM, September 20, 1858. *Davies, Sutherland and Hogeboom*, Justices.]



WARWICK vs. THE MAYOR &c. OF NEW YORK and others.

A complaint asking for relief to the plaintiff individually; or, if that cannot be granted, then for relief in respect to the same subject matter, to him and other persons as tax-payers, is bad on demurrer.

The pre-emption right in lands under water, which by the act of 1837, establishing the 13th avenue in the city of New York, was given to the proprietors of adjacent lands previously granted by the mayor &c. is not a personal, independent right of the grantee of previously granted adjacent premises, capable of separate, independent conveyance; nor is it strictly an incident or appurtenant of such premises, but is an incident of the grantee's estate and proprietorship in such premises; and will pass from him, with such estate, by a sale of the premises under a mortgage executed by the grantee.

Warwick v. The Mayor &c. of New York.

DEMURRER to complaint.

S. A. Foot, for the plaintiff.

A. K. Lawrence, jun., for the defendants.

By the Court, SUTHERLAND, J. The complaint in this action appears to be a sort of fishing complaint. The plaintiff spreads a broad net. If he cannot get any thing for his own individual benefit, he then goes for the benefit of all the tax-payers of the city of New York. He claims that as the proprietor in 1837, of a certain lot of land bounded on West street in the city of New York, he is entitled to a grant in fee from the corporation of the city of New York of certain lands under water, adjoining said lot; and prays that such a grant to him, individually, be directed to be made; but if he is not entitled to such grant, he then asks, as a tax-payer, for himself and all other tax-payers of the city, that a grant of said land under water which had been made by the corporation, to one Robert H. Durfee, in 1852, and all subsequent grants under the same, be declared void, making James S. Thayer and Miner C. Story, the present claimants and parties in interest under the grant to Durfee, parties defendants.

Now, the defendants demur to this seesaw, swinging complaint, which leaves the end finally to settle uppermost to depend upon the end the judicial foot is put upon, on the ground (among others) that it contains two causes of action which are improperly united.

Whether according to a critical analysis of code definitions there are two distinct causes of action or not, I should have held, as an original question, that the wrongs complained of were different, and the remedies asked for different, and inconsistent to be complained of and to be asked for in the same action; for the plaintiff's individual rights as a proprietor, stated in his complaint, are inconsistent with the rights of the tax-payers as therein stated; and if the plaintiff is entitled to the

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grant from the corporation, then there is no need of declaring the grant to Durfee void, and the tax-payers have not been injured or defrauded by that grant. The plaintiff does not pretend in his complaint that there is more than one cause of action; he does not pretend that there has been more than one wrong, or that there is more than one remedy needed; but he is in doubt whether he alone has been wronged, or all the tax-payers of New York. He goes in for himself individually first; and if he should fail, then, in a spirit of enlarged benevolence, for the tax-payers generally. The relief asked for the tax-payers, and the relief asked for himself, relate to the *same subject matter*; only one is required, and only one can be granted; which, is the question for the court. The theory of the complaint is not, therefore, that there are two causes of action.

But can the plaintiff, in the same complaint, thus first present his own individual wrongs for judicial relief, and then the wrongs of the public, although relating to the same subject matter; especially when, if the plaintiff is right in his view of his own rights and wrongs, the public have no rights, and have suffered no wrong, whatever? I think not. I think the code does not authorize this kaleidoscope sort of pleading, alternating for the judgment of the court; presenting different phases of the same act or acts, or of different acts relating to the same subject matter, and presenting different wrongs as these acts affect different parties, in the same complaint, for judicial redress. By the code, the plaintiff must state the facts which constitute his cause or causes (if he has more than one which may be united, and he chooses to unite them,) of action, but the code does not authorize this omnibus sort of complaint, stopping as it goes along to take in other parties. By the code the plaintiff may, in his complaint, present the facts which constitute *his* case, or cases, if *he* has more than one which may be united; but he cannot experiment with the court, by trying first his own case, and then that of himself and others. The code may cover a multitude

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of sins, but it is not so charitable as to permit the plaintiff to drop his own case and take up that of himself and neighbors in the same action.

These would have been my views upon the question of pleading, raised by this ground of the demurrer in this case. I have not looked into the decisions upon this or analogous questions, in the books ; for this point raised by the demurrer has been rendered quite unimportant in this case by the decision in the case of *C. V. S. Roosevelt v. Draper and others*, at the last May general term, in the first judicial district. In that case it was held that a tax-payer, as such merely, has not such an interest as enables him to maintain an action in behalf of himself and all other tax-payers of the city, *to avoid a deed or grant which has been actually executed by the corporation*, upon the ground of fraud, want of authority, or irregularity. With that decision falls all that part of the plaintiff's complaint as a tax-payer merely, setting forth the rights and wrongs of the tax-payers at large, of the city of New York, and claiming that the grant to Durfee, &c., should be declared void. According to this decision, the plaintiff's complaint does not show that he has any cause of action, unless, as proprietor of the lot on West street, described in the complaint, he is entitled to a grant of the land under water, adjoining, from the corporation of the city ; and one of the grounds of demurrer being that the complaint does not state facts sufficient to constitute a cause of action, the only remaining question raised by the demurrer is, whether, on the facts stated, the plaintiff is entitled to a judgment that the corporation execute such grant to him.

This is the important question in this case, and although it appeared at first a question of some difficulty, and much learning and logic were exhausted on the argument of it, yet it turns out upon examination, I think, to be exceedingly simple, requiring only a careful attention to the facts and a close scrutiny of the nature or character of the pre-emptive

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right claimed by the plaintiff, to the land under water, under the act of 1837, for its solution.

Now what are the facts stated in the complaint, bearing on this question, whether the plaintiff himself has a right to a grant from the corporation for the lot or land under water, in question? In 1827, the mayor &c. of the city of New York, being the owners in fee of a certain lot of land under water, upon the easterly shore of Hudson river, adjoining West street, granted the same in fee to one James Patten. In 1832, Patten conveyed a part of the same in fee to one Mercein. Patten and Mercein subsequently filled in the same, and streets and wharves were laid out and constructed thereon. Afterwards, in 1833, Mercein, by his two several conveyances, conveyed several parts or portions of the same to the plaintiff, in fee, and at the same time the plaintiff executed a mortgage of one part to Mercein, for eight thousand dollars, and of the other part to the New York Equitable Insurance Company, for one thousand dollars. Afterwards, in June, 1833, Mercein assigned his mortgage to the insurance company; and in 1835, the plaintiff executed another mortgage of one of the parcels so conveyed to him, to the same insurance company, for three thousand dollars. In 1836 these mortgages were all assigned to the mayor &c. of the city of New York. In 1840, 1842, the mayor &c. foreclosed these mortgages; purchased the mortgaged premises for ten thousand dollars, and obtained a master's deed therefor.

By § 3 of the act of April 12th, 1837, establishing the 13th avenue in the city of New York, and extending the exterior limit of the city along the eastern shore of Hudson's river, between Hammond and 135th streets, the mayor &c. were vested with all the right and title of the people of the state to the lands covered by water, between Hammond and 135th streets, and extending westerly, from the westerly side of lands under water, granted to the mayor &c. under the act entitled "An act relative to improvements in the city of New York," passed February 25th, 1826, to the westerly side of

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13th avenue, as established by the act of 1837. The premises so granted to Patten, by the mayor &c., in 1827, and parcels of which were so afterwards conveyed by his grantee to the plaintiff, and mortgaged by the plaintiff, was a portion of the land under water, the title to which was vested in the mayor &c., by or under the act of 1826. By § 4 of the act of 1837, "The proprietors of all grants of lands under water or of water lots, heretofore made by the said mayor &c., shall have the pre-emptive right in all grants to be made by the said mayor &c., of any lands under water, granted to them by this act, adjacent to and in front of the lands so heretofore granted," &c. The plaintiff claims that notwithstanding his mortgages, he was, when the act of 1837 was passed, proprietor of the mortgaged premises, within the meaning of § 4, and being such proprietor then, *has now*, notwithstanding the foreclosure and sale under the mortgages, this pre-emptive right, and is now entitled to a grant from the corporation.

If this mere statement of the plaintiff's facts and claims is not sufficient to show that he has no claim to this pre-emptive right or grant now, a very slight examination of the nature and character of this pre-emptive right will make it perfectly clear that if the plaintiff, as proprietor of the mortgaged premises when the act of 1837 was passed, took or had this pre-emptive right under the act, it passed from him by the foreclosure and sale with his proprietorship and title in the mortgage; *not as a vested right or interest in or to a specific, separate, independent piece or lot of land; or even as an appurtenance to or of the mortgaged premises; not as a right, or interest or estate in any lot or land; but as a right to an interest or title, or to the grant of an interest or title* in and to a certain specific lot of land, given to the proprietor of a certain other adjoining lot of land, incident to and inseparably connected with the proprietorship of such other adjoining lot.

This pre-emptive right, which it may be conceded the plaintiff had and took, as proprietor of the mortgaged premises,

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under the act of 1837, was not a personal independent right of the plaintiff, capable of separate, independent conveyance or disposition; nor was it strictly an incident or appurtenant of the mortgaged premises, but of the plaintiff's estate and proprietorship in the mortgaged premises, and passed with such estate and proprietorship under the foreclosure and sale.

The whole argument of the counsel for the plaintiff is founded on his starting error, that this pre-emptive right was or is a *right or interest in land*. It was, and is, a right to the grant of a right or interest in land. The act does not give the title of the people to the proprietors, but to the mayor &c. The third section vests the title in the mayor &c., and the fourth section secures to the proprietor *the first offer of a sale of a right and interest; the right to purchase a right and interest in the land under water first*. When a grant from the mayor &c., under the act, is called for, the question is, who is the proprietor, not who has been or was the proprietor when the act was passed.

All the plaintiff's estate and interest in the mortgaged premises having passed from him by the foreclosure and sale, nothing can be clearer than that he has not been since, and is not now, entitled to the grant which he claims under the act of 1837.

The defendants must therefore, on the whole case, have judgment on the demurrer, with costs.

[NEW YORK GENERAL TERM, October 4, 1858. *Davies, Clerke and Sutherland*, Justices.]

BENJAMIN BLOSSOM and CHARLES M. BLOSSOM *vs.* EDWARD
CHAMPION and ALBERT WOODHULL.

The plaintiffs contracted to sell to B. 843 barrels of spirits of turpentine, for cash, to be paid upon delivery of the turpentine on board the ship *Victoria*. Before the goods had been paid for, or delivered on board the ship, B. sold the same to W., and the latter, after 529 barrels had been put on board, went to the office of the agent of the ship and representing that the remainder was alongside and would be put on board without delay, and giving the guaranty of a third person to that effect, he procured a bill of lading for 800 barrels, which was signed by C. as master of the ship, and delivered to W. as owner and shipper of the goods. W. indorsed the bill of lading to W., A. & Co., who took the same in good faith and without notice of the plaintiffs' claim and advanced \$10,000 to W. upon it. W. having failed, before the turpentine had been paid for, the plaintiffs applied to C. the master of the vessel, for a bill of lading, which was refused; C. stating that he had already given a bill to W. A demand of the goods was then made by the plaintiffs, and refused. *Held* that the actual delivery of the goods on board ship, by the plaintiffs, under the contract of sale, without notice of ownership, or that the price had not been paid, and without taking receipts or a bill of lading, and the subsequent execution of the bill of lading to W. and his indorsement thereof to W., A. & Co., freed the goods from the plaintiffs' right to resume the possession of the same for the non-payment of the price.

Held, also, that as between the plaintiffs and the bona fide indorsees of the bill of lading, the plaintiffs' delivery under the contract of sale must be deemed to have been absolute and unconditional.

Held, further, that the plaintiffs had not a right to resume the possession of the goods without paying, or offering to pay, the moneys in good faith advanced by W., A. & Co., to W. on the bill of lading.

And that, as against C., the master of the ship, they were not entitled to a delivery of the goods without indemnifying him against his liability under the bill of lading.

MOTION for a new trial, upon a bill of exceptions. The action was replevin, for 844 barrels of spirits of turpentine, and was tried by a jury; who found a verdict for the plaintiffs, and assessed the value of the property at \$14,476.81.

G. Dean, for the plaintiffs.

Daniel Lord, for the defendant Champion.

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By the Court, SUTHERLAND, J. This was an action to recover the possession of 844 barrels of spirits of turpentine, on board the ship *Victoria*, in the port of New York, of which ship the defendant *Champion* was master.

At the time of the commencement of the action, the plaintiffs claimed the immediate delivery of the property, and the same was unladen from the ship and delivered to the plaintiffs. Five hundred and twenty-nine barrels of the turpentine were delivered on board the ship on the 12th and 13th, and the remaining 315 barrels on the 15th or 16th of January, 1855. On the 13th of January, when 529 barrels were on board, the defendant *Woodhull* went to the office of the agent of the ship and requested bills of lading for the turpentine, stating that the greater part was on board, and the rest alongside; and upon his delivering the written guaranty of one A. C. *Woodhull*, that it should be put on board without delay, a bill of lading for 800 barrels in the usual form, to be delivered at the port of London, "unto order or assigns," was made out, signed by *Champion* as master, and delivered to him, (the defendant *Woodhull*,) as owner and shipper. On receiving the bill of lading, *Woodhull* indorsed it to *Warburgh, Azemar & Co.*, who advanced him \$10,000 on it. When the bill of lading was given, the lighterman's receipts were not surrendered; nor does it appear that any thing was said about them. *Woodhull*, in December, 1854, made a contract with the agent of the ship to take in her, on freight, to London, a quantity of spirits of turpentine. On the 9th of January, 1855, *Woodhull* made a contract with *Blossom & Alburtus*, (*Blossom* being a son of one of the plaintiffs and brother of the other,) for the purchase of this parcel of spirits of turpentine, to be delivered on board the *Victoria*, informing them of his agreement for the freight; to be paid for, *Woodhull* says, in ten days; but *Blossom* (of *Blossom & Alburtus*) says the sale was for cash on delivery. *Blossom & Alburtus* not having the spirits of turpentine, bought the parcel of the plaintiffs for cash on delivery aboard the *Victoria*. When

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sold by the plaintiffs, the spirits of turpentine was on storage, in the storage yard of a Mr. Robbins in Brooklyn, and from his yard was by him delivered on board the Victoria, in lighters, by order of the plaintiffs. Printed blank receipts were sent with the lighters, and after being filled up and signed by the mate of the Victoria, were returned with the lighters to Robbins. These receipts did not contain the name of any person as freighter or shipper. In this respect they were all alike. The following is a copy of one of them :

“New York, January 12th, 1855.

Received from lighter Wave, on board ship Victoria, two hundred and ninety-four barrels spirits turpentine, in good order.

A. E. ANDERSON.

294 bbls.”

Robbins says the receipts sent by lighters were printed blanks, made for the convenience of the storage yard, which he kept bound up in a book and were cut off as used, and sent with lighters. The lighterman's receipts were delivered up by Robbins to the plaintiffs. On the 17th of January the plaintiffs called on F. A. Blossom (of Blossom & Alburtus) with these receipts for payment. F. A. Blossom told one of the plaintiffs (his brother,) that *he* had not been paid, and could not pay. The plaintiffs, with F. A. Blossom, then (the same day,) called upon the defendant Champion and requested bills of lading in the plaintiffs' name. Champion refused, stating that he had already given bills of lading to Woodhull. On the same day the plaintiffs demanded the delivery to them of the 844 barrels of spirits of turpentine from the defendant Champion, and it was refused. On the following day the goods were taken from the ship by the proceedings in this action, and delivered to the plaintiffs.

These are the principal facts which appeared on the trial of this action at the circuit. There was no evidence that the master, owners or agents of the ship had any notice that the plaintiffs were the owners, or that Woodhull was not the owner of the goods, before the bill of lading was delivered to

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Woodhull, or until the plaintiffs requested bills of lading in their name. There is nothing in the case to show that the master did not act in good faith in giving the bills of lading to Woodhull.

The foreman in charge of the lighters, in delivering the spirits of turpentine, spoke of it to the mate as Woodhull's turpentine. There was no notice to the mate, when delivered, that it was not Woodhull's. Robbins, in whose storage yard the turpentine was, and who delivered it by the order of the plaintiffs, before it was delivered and before the bill of lading was given to Woodhull, called upon the agent of the ship and complaining of the delay in receiving it on board, asked "why the ship did not take in Woodhull's turpentine."

Woodhull failed on the 17th of January, and in a few days afterwards made an assignment; and F. A. Blossom had been informed of his failure when he called with his father (one of the plaintiffs,) upon the master of the ship for the bills of lading; but Woodhull undertakes to explain his failure, and swears that on the 13th of January, he did not mean to stop.

It appears from the case, that in making the purchase of the plaintiffs, the name of F. A. Blossom only was used, and Woodhull's not mentioned; that F. A. Blossom was in good credit not only with the plaintiffs but with others; that Woodhull was in good credit with F. A. Blossom, but not in as good credit as F. A. Blossom, with the plaintiffs or with others. It also appears, that F. A. Blossom and Woodhull had various transactions together of like character, before, on account of which Woodhull was indebted to F. A. Blossom, or to Blossom & Alburtus, about \$10,000 when this transaction took place; that on the 13th of January, before the bill of lading was given to Woodhull, F. A. Blossom called upon Woodhull and asked him if he was not going to send his bills of lading by the steamer that day; told him that he might as well do it, as the spirits of turpentine would be all on board by 12 o'clock, and that he was short and wanted

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some money. It also appears that on the 13th of January, Woodhull paid to F. A. Blossom \$2000 of the money received of Warburgh, Azemar & Co. The evidence does not show that Woodhull procured the delivery on board the ship, or the bill of lading, fraudulently. It was conceded on the argument, that Warburgh, Azemar & Co. were bona fide indorsees of Woodhull's bill of lading, for value, without notice of the plaintiffs' claim.

The most favorable view of the plaintiffs' case, which the evidence will warrant, is, that as between them and Blossom & Alburtus, and as between Blossom & Alburtus and Woodhull, the sale and delivery was conditional, and that on the non-payment of the price, they had a right to reclaim the goods. This was the ground upon which, at the circuit, they put their right to retake the possession of the goods, and upon which, on the argument of this case, they resisted the defendant Champion's motion for a new trial. The judge at the circuit viewed it as a question of title, and charged the jury in substance that as the plaintiffs held the ship's receipts, they were entitled to the bill of lading; that they had not actually delivered the goods; and if the sale was for cash on delivery, the price not having been paid, the plaintiffs were entitled to the re-delivery thereof, and to recover.

The case is certainly not free from difficulties; but upon the whole, I think the judge at the circuit erred in his view of the question.

I am inclined to think the question is not one of title; but rather, *conceding* the sale to have been conditional as between the plaintiffs and Blossom & Alburtus, and as between Blossom & Alburtus and Woodhull, and that as between them the title did not pass, and the plaintiffs had a right to resume possession on the non-payment of the price, whether the plaintiffs could assert their title and resume the possession of the goods thus given by them to the ship, *as against Warburgh, Azemar & Co., the bona fide indorsees of the bill of lading, without paying or offering to pay their*

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advance on it; or as against the master of the ship, without indemnity; for any responsibility which he had thus been led by the plaintiffs to assume, by issuing the bill of lading to Woodhull.

Could the plaintiffs resume the possession of these goods as against the indorsees of the bill of lading without paying their advance on it?

As between the plaintiffs and Blossom & Alburtus, and as between the latter and Woodhull, the delivery on board the ship was a delivery to the vendees. The goods were to be delivered on board the *Victoria*, and if the plaintiffs had got their money, they never would have asked for a bill of lading. On receiving their pay the plaintiffs expected to deliver up the receipts to the vendees, and let them get the bill of lading. The plaintiffs did actually deliver the goods on board the ship, without any notice to the master, or agent, or owners, or any one on board, that they had not received their pay for the goods; without notice that the delivery was conditional; without notice even that they were the owners and shippers.

The lighterman's receipts appear to have been mere vouchers as between the men in charge of the lighters and Mr. Robbins, to show the delivery of the goods on board. Not containing the names of the plaintiffs as shippers and owners, as the shipper's receipts did in *Jones v. Bradner*, (10 Barb. 200;) *Craven v. Ryder*, (6 Taunt. 433;) *Brower v. Peabody*, (3 Kern. 121;) they did not imply notice of who the shippers or owners were, and did not on their face give the plaintiffs a right to a bill of lading or to control the disposition and further delivery of the goods.

These lighterman's receipts did not show *that the plaintiffs' delivery on board the ship was not an absolute, unconditional delivery to their vendee*. Had the goods been delivered by the plaintiffs to Blossom & Alburtus, not on board the ship but at their warehouse, without payment, and Blossom & Alburtus had sold and delivered the goods to a bona fide pur-

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chaser without notice, the plaintiffs' lien for the price of the goods would have been gone, and they could not have reclaimed them, as against such bona fide purchaser. (*Smith v. Lynes*, 1 *Selden*, 41-48. *Palmer v. Hand*, 13 *John*. 434. *Caldwell v. Bartlett*, 3 *Duer*, 352.)

The delivery of the goods in this case on board the *Victoria* was an actual delivery, though conditional. The possession of the ship was the possession of Woodhull, as between him and Blossom & Alburtus, and the possession of the latter as between them and the plaintiffs. The bill of lading on its execution represented the goods; and was so far negotiable, at least, that the indorsement of it to Warburgh, Azemar & Co. without notice, for value, gave them all the rights and protection of bona fide purchasers. (*Lickbarrow v. Mason*, 2 *T. R.* 70. 1 *H. Bl.* 357. *Parker v. Patrick*, 5 *T. R.* 175. *Conrad v. Atlantic Ins. Co.*, 1 *Peters*, 386, 444, 5. *Gibson v. Stevens*, 8 *Howard*, 384, 400. *Bank of Rochester v. Jones*, 4 *Comst.* 497. *Keyser v. Harbeck*, 3 *Duer*, 373. *Walter v. Ross*, 2 *Wash. C. C. R.* 283. *Nathan v. Giles*, 5 *Taunt.* 558, 573. *Morrison v. Gray*, 9 *Moore's C. B. R.* 484. *The Mary Ann Guest*, 1 *Blatchf. C. C. R.* 358.)

If, as was said by the court in *Dows v. Perrin*, (16 *N. Y. R.* 325,) outside of the case actually before the court, a party who obtains a bill of lading from the owner of the goods by fraud, by indorsing it over, puts his bona fide indorsee in no better position than he is, it does not appear, nor is it claimed in this case, that Woodhull procured the delivery of the goods on board the vessel by fraud; or that he obtained the bill of lading from the plaintiffs by fraud.

The right of stoppage *in transitu*, when goods are sold on credit, and the right of resuming possession when sold for cash and actually delivered, are practically the same. In either case the exercise of the right is the enforcement of the vendor's lien on the goods for the price, by reinvesting himself with the possession. (*Hodgson v. Loy*, 7 *T. R.* 445. *Gorden v.*

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Harper, Id. 9. Wentworth v. Cuthwait, 10 Mees. & W. 375. Palmer v. Hand, 13 John. 434. 2 Kent's Com. 541.)

Although originally the right of stoppage *in transitu* came from a court of equity, on the theory that the title had passed by the sale and delivery to the carrier, and the right of resuming possession in cases of conditional sales for cash may be upon the theory that the title has not passed, yet the practical right of retaking the goods, is the valuable right in both cases, and is exercised by the vendor in both cases for the purpose of obtaining his pay for the goods. The equities of the bona fide purchaser without notice from a vendee in the actual possession of the goods who was to pay cash, are at least as great as the equities of a bona fide purchaser from a vendee not in the actual possession who has bought on credit. As the right of the unpaid vendor to stop the goods in transitu on discovering the vendee's insolvency, is defeated by the vendee's negotiation of the bill of lading to a bona fide indorsee, so I think that in this case, the actual delivery of the goods on board ship by the plaintiffs *under the contract of sale*, without notice of ownership, or that they had not been paid, and without taking receipts or a bill of lading which would have enabled them to control the possession and disposition of the goods, and the subsequent execution of the bill of lading to Woodhull and his indorsement of it, *as to his bona fide indorseees of the bill of lading*, freed the goods from the plaintiffs' right to resume the possession of the goods for the non-payment of their price. As between the plaintiffs and the bona fide indorseees of the bill of lading, the plaintiffs' delivery under the contract of sale, must be deemed to have been *absolute and unconditional*.

Had the case shown that Woodhull had fraudulently procured the delivery of the goods on board the ship by the plaintiffs, under a contract of sale, and had fraudulently procured the bill of lading on their delivery; *yet as the possession of the ship would not even in that case have been tortious*, and as the greater part of the goods were actually on board when

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the bill of lading was executed ; and the remainder were put on board before the plaintiffs gave any notice of their ownership or claim ; I have found no case or authority except that of *Dows v. Perrin*, (16 *N. Y. Rep.* 325,) tending to show that Warburgh, Azemar & Co., as bona fide indorsees of the bill of lading, would not have been protected as bona fide purchasers. (*See cases before cited, and Mowrey v. Walsh*, 8 *Cowen*, 238.)

In *Saltus v. Everett*, (20 *Wend.* 269,) the bill of lading through which the Messrs. Saltus claimed, was not executed by Collins, the master of the vessel by which the shippers at New Orleans shipped the lead, but by the master of another vessel to which *Collins, without the authority of the shippers*, had fraudulently or wrongfully transferred it. The complaint in this case admits the possession of the ship to have been lawful. The plaintiffs complain of an unlawful detention, not of an unlawful taking of the property. The case of *Dows v. Perrin*, (16 *N. Y. R.* 325,) was peculiar, inasmuch as Niles & Wheeler, by whose clerk the bill of lading was made out and delivered, were not only the carriers but the owners of the goods. The real question in the case was whether they had authorized the execution or *delivery of the bill of lading* to Bloss. In *Brower v. Peabody*, (3 *Kernan*, 121,) the ship's receipts containing the names of the owners and shippers were *stolen* by Lovett, one of the vendees, *not delivered to him by the owners*.

Admitting that according to the usage of trade, in this case, the master of the vessel ought not to have given the bill of lading to Woodhull without the surrender of the lighterman's receipts ; yet the right and title of Warburgh, Azemar & Co., as bona fide indorsers of the bill of lading, ought not to be affected by such irregular or wrongful act of the master. The convenience—I might almost say the necessity—of commerce, requires bills of lading to be so far negotiable as to protect the title of the bona fide indorsees of the bill of lading in this case.

If the delivery of the bill of lading to Woodhull was not

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the plaintiffs' fault, in delivering the goods on board without receiving the price, or giving notice that they had not been paid and without requiring receipts therefor in their own names, which would show that they meant to retain the possession and control of the goods, but was the master's fault in neglecting to require the surrender of the lighterman's receipts, then the plaintiffs should have brought trover against the master for the wrongful conversion of their goods by the delivery of the bill of lading to Woodhull; and in such action they might have recovered the value of the goods &c. as damages. Such an action would not have repudiated the rights and title or constructive possession of the bona fide indorsees of the bill of lading, but would have affirmed them; because it would have been instituted and would have proceeded, on the ground that as between the plaintiffs and the master of the ship, the plaintiffs were entitled to claim a delivery of the goods, but that as between the plaintiffs and the bona fide indorsees of the bill of lading they were not.

I believe all the cases cited by the counsel for the plaintiffs on the argument, to show his right to maintain this action of replevin, were cases of trover against the master, except that of *Brower v. Peabody*, (3 Kern. 121.)

There is great conservatism in long settled forms, and I am not sure that the abolition of all forms of actions and of pleadings has not led, and may not lead occasionally, inadvertently, to the confusion, if not abolition of principles. But again, if bills of lading are not negotiable and do not represent the goods, so that the bona fide indorsees of the bill of lading in this case were not in the possession of the goods as bona fide purchasers, and are not entitled to protection as such, then, as the master of the ship delivered the bill of lading to Woodhull in good faith, and without notice, and under the freight contract with Woodhull, under which he had a right to presume the goods were sent on board, I think as against the master the plaintiffs had no right to complain of the results

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of a possession thus given by them to the ship ; and that they were not entitled to a delivery of the goods from the ship, without indemnifying the master against his liability under the bill of lading. The issuing of the bill of lading under the circumstances, as to the plaintiffs, put the master in the position of a bona fide purchaser without notice. (*Keyser v. Harbeck*, 3 *Duer*, 373. *Caldwell v. Bartlett*, *Id.* 352. *Tindall v. Taylor*, 28 *Law and Eq. R.* 215.) If Warburgh, Azemar & Co. as the bona fide indorsees of the bill of lading, had not a right to hold the goods until paid the amount advanced by them on it, then the master was absolutely liable to them, under the bill of lading, for such advances. (*The Mary Ann Guest*, *supra*.)

In either view of the case, the plaintiffs had not a right to resume the possession of the goods, without paying or offering to pay, the moneys in good faith advanced by Warburgh, Azemar & Co. on the bill of lading. I come to this conclusion with the less regret, because it would appear from the case, that this action was in fact brought for the benefit of F. A. Blossom, or of Blossom & Alburtus, to whom the plaintiffs sold the goods ; and F. A. Blossom certainly does not appear in the transaction in as favorable a light as either the indorsees of the bill of lading or the master of the ship. F. A. Blossom was a man of responsibility. The plaintiffs might have waived the condition of the sale ; treated it as an absolute sale ; and recovered the price of the goods of him, or of him and Alburtus. Instead of doing this, after being informed that the bill of lading had been delivered to Woodhull, and probably, of the circumstances under which it had been so delivered, and Woodhull had obtained the advance on it, the plaintiffs chose to rescind the contract, and release F. A. Blossom by claiming and actually by legal proceedings obtaining a delivery of the goods to them ; and F. A. Blossom, on the trial, aids them with his testimony, although it would appear that before all the goods were on board the ship, he made the sug-

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gestion to Woodhull to get the bill of lading, and received \$2000 of the money which Woodhull procured on it.

The motion for a new trial must be granted, with costs to abide the event.

[NEW YORK GENERAL TERM, October 4, 1858. *Davies, Clerke and Sutherland, Justices.*]

MILHAU vs. SHARP.

Individuals owning lots fronting on a public street of a city may maintain an action to enjoin the construction in such street of a railway, which would be specially injurious to their property.

When a nuisance occasions, or is likely to occasion, a special injury to an individual, which cannot well be compensated in damages, equity will entertain jurisdiction of the case.

APPEAL from a judgment rendered at a special term. The complaint was filed by the plaintiffs, stating that they were owners of lots on Broadway in the city of New York, with buildings erected thereon, and doing business therein. That the defendants were about to construct a railway therein, without legal authority, and that such railway would be specially injurious to them. The judge before whom the case was tried, at special term, found as matters of fact: 1. That the plaintiffs are, severally, owners and occupants of buildings fronting upon said streets, and of the lots of land upon which said buildings are erected, as particularly set forth in the complaint, and have been such owners and occupants for several years last past. 2. That the establishment of a rail road in Broadway aforesaid will be specially injurious to the said property of the plaintiffs. Upon this finding a judgment was entered, perpetually enjoining and restraining the defendants from entering into or upon said street called Broadway, for the purpose of laying or establishing a rail road therein under

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the grant referred to in the complaint. From which judgment the defendants appealed to this court.

David Dudley Field, for the appellants.

G. C. Bronson and *J. Van Buren*, for the respondents

By the Court, DAVIES, P. J. The only question necessary to consider on this appeal is, whether upon the facts found, the plaintiffs can maintain this action, and if so, are entitled to the relief which has been granted.

It appears to me that both of these points have been settled in the affirmative, by the Court of Appeals, in the case of *Davis & Palmer v. Mayor &c. of New York*, (4 Kern. 506,) a suit relating to this same grant. It is true that other questions were presented and argued in that case, and decided by the court, but it seems to us that the points presented in the case, were also presented and distinctly passed upon. DENIO, Ch. J., in delivering the opinion of the court in that case, says: "It is well settled that when such an offense (that is, a nuisance) occasions or is likely to occasion a special injury to one individual which cannot well be compensated in damages, equity will entertain jurisdiction of the case at his suit." And he cites numerous authorities to sustain that position. WRIGHT, J., who delivered the dissenting opinion of the court, manifestly concurred in this view of the law, for he says, "Private persons could not interfere, except the act authorized tended to the creation of a public or private nuisance specially injurious to them, and from which they apprehended a direct special damage."

In that case it was not proven that the plaintiffs were the owners of lots on Broadway, and the superior court found, as matter of fact, that the railway would not be a nuisance or specially injurious to the plaintiffs. It is seen that the facts found in this case are entirely different, and it appearing here that the plaintiffs are the owners of lots on Broadway, and

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that the establishment of the proposed railway would be specially injurious to their property, we must affirm the judgment of the special term, on the authority of the Court of Appeals in *Davis & Palmer v. The Same Defendants*.

Judgment affirmed with costs.

[NEW YORK GENERAL TERM, October 4, 1858. *Davies, Sutherland and Ingraham*, Justices.]

MEYER vs. VAN COLLEM and others.

TURNER vs. THE SAME.

FRANKENHEIMER and another vs. THE SAME.

Where a complaint contains a good cause of action against several defendants, who are partners, upon contract, and prays judgment therefor, it is not rendered demurrable by going on to allege the insolvency of the defendants, and the confession of a judgment by them to defraud their creditors; and asking for an injunction and a receiver.

If a complaint, in addition to the statement of a good cause of action, contains unnecessary and improper matters, the remedy of the defendant is to move to have the improper matter stricken out.

APPEAL from an order made at a special term, overruling a demurrer to the complaint.

By the Court, SUTHERLAND, J. The complaints in these three cases may be considered as identical, in looking at the questions raised by the demurrers to the complaints. Each complaint states an indebtedness from the firm of De Young, Newman & Schmidt, to the plaintiff, or plaintiffs, setting out the origin or consideration of such indebtedness, and asks for a judgment for the amount of such indebtedness, against all the defendants. The complaints then allege certain facts to show Van Collem liable as a general partner, although orig-

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inally, by the terms of the partnership agreement, he was to be a special partner only, and liable only as such. The complaints also allege a secret, collusive and fraudulent confession of judgment by De Young, Newman & Schmidt to Van Collem, for the purpose of hindering, delaying and defrauding the creditors of the firm ; that the defendants, except Van Collem, are insolvent ; ask a temporary injunction, restraining all the defendants from assigning or disposing of the partnership property, except by general assignment for the benefit of all the creditors pro rata and equally ; and for an injunction restraining Van Collem from proceeding on, or enforcing his judgment, or the execution which had been issued thereon and was then in the hands of the sheriff ; and for a receiver.

The grounds of demurrer are : 1st. That the complaints do not contain sufficient facts to constitute a cause of action. 2d. That several causes of action have been improperly united

The code, § 2, defines an action to be an ordinary proceeding in a court of justice by one party against any other party, for the enforcement or protection of a right, the redress or prevention of a wrong, &c. A *cause of action* may be defined to be the right which a party has to institute and carry through such a proceeding. The complaint states the facts showing this right. The unity of the *right* to be enforced or of the *wrong* to be redressed, constitutes the unity of the action. The kind of action or proceeding depends on the nature of the right to be enforced, or wrong to be remedied ; but the kind or the multifariousness of the proceedings in an action, does not affect the unity of the action ; which depends solely on the unity of the right to be completely enforced, or the wrong to be completely redressed.

In actions to collect debts, the wrong is the detention or non-payment of the debt ; and the wrong has been completely redressed when the creditor has got his money. The ordinary action or proceeding for the collection of a debt ends with judgment and execution ; for ordinarily judgment and execution enforce the collection or payment of the money ; but if

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they do not, then the creditor having acquired an additional right, or a specific lien on the concealed property of his debtor, can commence other proceedings, or a new action in aid of his judgment and execution to recover his debt, either for the purpose of discovering any concealed property or removing any fraudulent obstruction in the way of his execution. Without such judgment and execution he has no *new* or *other cause* of action, and no greater or better right to the property of his debtor, or the proceeds thereof, than any other creditor in like position.

Now in these actions the complaints set forth an indebtedness, and facts to show that Van Collem is liable with the other defendants, and claim a judgment against all the defendants for the debt. The facts stated appear to be sufficient to make Van Collem so liable. The complaints do therefore severally contain one cause of action, and ask for the ordinary judgment or remedy for the recovery of money. The first ground of demurrer is not, therefore, well taken.

But because the complaints not only ask for judgment, but ask for a receiver, an injunction, and in effect to set aside the fraudulent judgment confessed to Van Collem, remedies which the plaintiffs are clearly not entitled to before they have got their judgments ; (*Reubens v. Joel*, 3 *Kern.* 488,) does it follow that they contain another cause of action, or more than one cause of action ? Certainly not ; because these remedies are asked for the purpose of collecting the *same* debt ; or in other words, as means to redress but *one* wrong, and the *same* wrong. After judgment and execution the plaintiffs will have new rights ; any obstruction of which may call for or authorize these or other additional remedies for the collection of the same debt ; and although for the collection of the same debt, they may be in a new or *another* action, because the same wrong is not to be redressed ; but the plaintiffs as judgment and execution creditors, are deprived of newly acquired rights.

The complaints in these cases contain severally, facts suffi-

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cient to constitute one good cause of action and a right to one remedy, the ordinary one of a judgment against all the defendants. All you can say about the other matters stated in the complaints and the other remedies asked for is, that the plaintiffs ask for more than they are now entitled to, and have unnecessarily and improperly inserted in their complaints various matters with a view to such additional premature remedies. They are liable to have these unnecessary and improper matters stricken out on motion, with costs, but I do not see that under the code they can suffer any other penalty, or the defendants have any other remedy.

If there is in these complaints more than one cause of action, no doubt they have been improperly united; but I have endeavored to show that there is but one cause of action, and the second cause of demurrer is not, therefore, well taken.

The two grounds of demurrer are inconsistent with each other. If the facts stated in the complaints constitute two causes of action, they must constitute one.

The judgments of the special term, for the plaintiffs, on demurrer, must be affirmed with costs.

[NEW YORK GENERAL TERM, October 4, 1858. *Davies, Sutherland and Ingraham*, Justices.]

WHITNEY and wife vs. THE MAYOR &C. OF THE CITY OF
NEW YORK, and others.

A court of equity will not interfere by injunction to restrain a municipal corporation from passing a resolution or ordinance giving permission to a railroad corporation to run steam engines on particular streets or avenues of the city; unless in a case where it appears that the mere voting on, and formal passage of, such resolution or ordinance, would instantly, without any action or attempt to enforce any right or privilege under it, effect an irremediable private injury.

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ORDER to show cause why a temporary injunction should not be continued.

G. C. Bronson, D. Dudley Field and Waldo Hutchins, for the plaintiffs.

C. O'Connor, Wm. Curtis Noyes, C. W. Sandford and R. Busteed, for the defendants.

SUTHERLAND, J. The plaintiffs, on their verified complaint, and a great number of affidavits in behalf of themselves and others similarly situated, ask for an injunction restraining the mayor, aldermen and commonalty of the city of New York, from granting authority or permission to the New York and Harlem Rail Road Company, or to any other company or person, to run steam engines on the Fourth avenue, or on the track of the said company below or south of Forty-second street, in the city of New York; and particularly from passing an ordinance, of which the following is a copy:

“ORDINANCE, in relation to the use of steam by the Harlem and New Haven Rail Road Companies as far south as 32d street, and repealing the resolution approved December 27th, 1854.

Be it ordained by the mayor, aldermen and commonalty of the city of New York, in common council convened:

Sec. 1. The New York and Harlem Rail Road Company, and the New York and New Haven Rail Road Company, are hereby authorized, empowered and permitted to use steam in the drawing of their passenger and freight cars on the track of the New York and Harlem Rail Road Company in Fourth avenue, to and from the northern extremity of Manhattan or New York Island, to the southern side of Thirty-second street.

Sec. 2. The resolution adopted by the board of aldermen December 7th, 1854, by the board of councilmen December 22d, 1854, and approved by the mayor December 27th, 1854, as also all other ordinances and resolutions, or parts thereof,

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so far as the same conflict herewith, including the resolution requiring the New York and Harlem Rail Road Company to run small cars to Forty-second street, are hereby annulled and repealed.

Sec. 3. This ordinance shall take effect immediately."

And also restraining the other defendants, the New York and Harlem, and the New York and New Haven Rail Road Companies from running any steam engine upon the track of said rail road, below or south of 42d street; where the locomotives now stop, in accordance with the ordinance of 1854.

The complaint alleges that the board of aldermen have already passed the resolution or ordinance, of which a copy is given above; and that the plaintiffs are informed and believe that it is the intention of a majority of the other board of the common council to pass it, and of the company to immediately avail themselves of it. The intention to pass the ordinance is not denied on the part of the mayor &c., nor is there any express denial on the part of the rail road companies that they intend to avail themselves of the ordinance when passed. The plaintiffs reside on Murray Hill, (so called,) at or near the corner of 35th street and 4th avenue. It is not alleged or pretended that the rail road companies will attempt to run their locomotives below 42d street unless the ordinance is passed. Should the ordinance be passed and the rail road companies avail themselves of it, and actually run their locomotives to the south side of 32d street, I have no doubt from the complaint and other papers used and submitted on this motion, that such actual running of locomotives south of 42d street, *unless authorized* by the ordinance in question, or otherwise legally authorized, would be a nuisance specially injurious to the plaintiff and to others living on Murray Hill, from the noise, smoke, gas, annoyances and dangers necessarily incidental to or resulting from the running of locomotives. Conceding this, it is not necessary, in my judgment, to state any other fact in the case to dispose of the motion.

In my opinion, neither the common council nor either branch

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of it should be restrained by the order of this court from meeting, or voting on, or from the mere passing of the ordinance, whether, if passed, it would or would not authorize the railroad companies to run their locomotives south of 42d street. The mere passage of the ordinance in question, though it repeals the ordinance of 1854, will not kindle the fires to set the locomotives in motion, and thus create the smoke, gas, noise, annoyances, danger and injuries necessarily incidental to, or resulting from, the use of locomotives in populous cities; and which, unless authorized by ordinance or otherwise, the plaintiffs would have a right to complain of; and the court a right to prohibit as a nuisance.

Should the ordinance be passed by the common council and approved of by the mayor, the rail road companies must undertake to avail themselves of the repeal of the ordinance of 1854, and of the authority or permission granted, or purported to be granted, by the ordinance in question; and their agents or servants must actually kindle the fires and set the locomotives in motion south of 42d street, before the incidental annoyances and injuries complained of and asked to be prevented, can take place.

In my opinion, if the court has power, at the instance of a private citizen, to restrain the mere act of voting on a resolution or ordinance proposed in either board of the common council, or to restrain its mere passage, as distinguished from the power to restrain an act or acts intended or attempted to be done and justified under it after its passage, there has been no sufficient reason shown in this case for the exercise of the power, by restraining the mere passage of the ordinance in question.

Indeed, after giving this question of the propriety, and even the question of the power of the courts to interfere with the common council before the passage of a proposed ordinance or resolution; and at the suit of a private citizen, to restrain the members of the common council, or of either branch, from meeting, voting on, or passing such proposed resolution or

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ordinance, the most critical and laborious examination, I must say, that I have come to the conclusion that the courts ought not thus to interfere in any case, unless in a case where it should appear—and I have not been able to conceive of any such case—that the mere voting on, and formal passage of, the proposed resolution or ordinance would instantly, without any action or attempt to enforce any right or privilege under it, effect an irremediable private injury.

On this question I do not see any reason for the distinction taken in some of the cases between legislative acts or ordinances (so called) of the common council, and resolutions operating as grants of privileges or property ; or for the distinction taken in other cases between revocable and irrevocable ordinances or grants. The members of the common council are public officers, acting as such under a delegation of limited political power ; and the mere passage of an ordinance by them, granting privileges or property which they had no power to grant, could not effect a private injury, because it would be utterly void. The mere passage of such an ordinance might be a breach of a public trust, for which the people of the state, by their attorney general, would have a right to call the municipal body to account. If passed through bribery and corruption the individual members bribed and corrupted might be indicted and punished ; whether any attempt was ever made to carry the ordinance into execution or not ; or whether the subject matter of the ordinance was within the scope of the powers of the common council or not ; or whether the ordinance was called for by the public good or public convenience or not.

In this case, on the question of the propriety of undertaking to restrain the mere voting on or passage of the ordinance in question by the common council or the board of councilmen, the distinction between that question and the question whether, when passed, the ordinance would or could authorize the rail road companies to drive their locomotives down to 32d street to the injury of the plaintiffs or others similarly situated, must

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be carefully taken and kept in view. The power to pass an ordinance is one thing ; its effect when passed is another thing. The right to vote on a resolution proposed for adoption is one thing ; the power to confer the privilege or to authorize the act undertaken to be conferred or authorized is another thing. In one sense the legislature has power to pass any law, constitutional or unconstitutional. No court would undertake to restrain the passage of an unconstitutional law ; but all action under an unconstitutional law would be restrained by the courts in many cases ; and in restraining such action, the courts would say, in another sense, that the legislature had no power to pass the law. I do not see but that the right of the common council to meet, vote on, and formally to pass resolutions should be as free from the restraint of the courts, at the suit of a private citizen, as the right of the legislature to pass laws.

It appears to me it will be time enough for the courts to interfere and adjudicate, at the instance of a private citizen, upon the effect or legality of an ordinance of the common council, after its passage, and when some one evinces at least an intention to avail himself of it, and to act, or to enforce some claim, right or privilege under it to the injury of the complainant. Courts of equity have power to restrain, and will in many cases restrain an act or threatened act, but after the examination which I have given the case, I cannot avoid expressing the opinion that the circumstances must be of the most extraordinary character, which would authorize the court to consider the mere saying "aye" or "no," by the members of either branch of the common council, on a proposition or resolution before them, as an act to be restrained by the court, in the exercise of its ordinary jurisdiction and discretion. The complaint in this case alleges, on information and belief merely, without stating the sources of the information, or the grounds of the belief, (unless alleged as an inference from the other facts alleged in the complaint,) that a majority of each board of the common council have been bribed, either by one

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of the rail road companies, or its agents, or other interested persons, &c. to allow the said rail road companies to run steam engines on the 4th avenue to 32d street, and to vote for the ordinance in question. The charge of bribery appears to have been made as an inference merely from other allegations in the complaint; and in any view I think it was too loosely made to call for a denial of its truth on the part of the members of the common council. But whether this charge of bribery is true or false, or whatever the motive of the members of either branch of the common council in voting "aye" or voting "no" on the ordinance, or in passing it; as the mere voting on it, or passing it, for the reasons above stated, is not an act to be restrained as injurious to the plaintiffs, the charge of bribery is of no consequence, to the question of restraining the mere passage of the ordinance.

Should the ordinance pass, and the rail road companies undertake to avail themselves of it, on an application by the plaintiffs or others similarly situated for an injunction restraining the use of locomotives below 42d street, the question of the power of the mayor, aldermen, &c. to authorize such use to the special injury of the plaintiffs and others residing on Murray Hill, so eloquently and ably argued before me, would have to be considered and passed upon. But if the view above taken of this case is correct, the question whether the ordinance will, if passed, authorize the rail road companies to run their locomotives down to the south side of 32d street is not before me, and any opinion expressed now on that point would be outside of the case. Without expressing, therefore, any opinion on that question, the motion for an injunction restraining the passage of the ordinance must be denied, on the ground that the mere passage of the ordinance will not and cannot produce any injury to the plaintiffs; and the other part of the relief asked for I consider prematurely asked for; and therefore pass no opinion as to the plaintiffs' right to it at the proper time.

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The temporary injunction order made in this case must be vacated, and the order to show cause discharged, with \$10 costs.

[NEW YORK SPECIAL TERM, October 28, 1858. *Sutherland*, Justice.]

THE PEOPLE OF THE STATE OF NEW YORK and JAMES B. TAYLOR and OWEN W. BRENNAN *vs.* THE MAYOR &C. OF THE CITY OF NEW YORK, and others.

In an action, under the code, to recover the possession of real estate, it is only necessary for the plaintiff to allege, in his complaint, that he is seised or possessed of some certain estate or interest in the premises, and entitled to the possession of the same; and that the defendant unlawfully withholds from him the possession thereof.

What are good causes of demurrer to a complaint, for want of form.

Where it appears from the complaint, in an action against a municipal corporation and others, to recover the possession of real estate, that the premises are actually occupied by the tenants of the corporation, the complaint shows that the plaintiffs have no right to make the corporation a defendant.

The rule of the revised statutes, that in such a case the tenants in the actual occupation shall alone be made defendants, has not been altered by the code.

Neither the common law rule, nor the statute making conveyances of land held adversely void as to the party in possession, applies to conveyances by the people of the state, or by public officers duly authorized.

Such conveyances are not within the reason of the common law rule, or of the statute; and strictly there can be no adverse possession, as against the people. The people cannot be disseised.

A lease of lands, from the people to individuals, is valid, and gives to the lessees a right of entry, although the premises are, at the time, actually held and occupied under a title hostile to the title of the state. And having the right of entry, the lessees can bring their action to recover the possession, and the rents and profits since the execution of the lease, as damages, &c.

A joint demurrer to a complaint, by several defendants, will be overruled if the complaint shows a cause of action by the plaintiffs, or a portion of them, against some of the defendants.

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DEMURRER to complaint. The complaint, as amended alleged that the people of the state of New York are now, and have been for many years past, owners in fee of certain premises situate in the city of New York, and lying on the westerly side of West street, and north of a parallel line of the southerly line of Dey street and south of the northerly line of Vesey street, in the third ward of the said city, and which premises are about 480 feet on West street and extend westerly about 440 feet, and are legally entitled to the rents, issues and profits thereof, up to the first of May, and to the possession thereof, since, unless a certain lease thereof to the plaintiffs, James B. Taylor and Owen W. Brennan, thereafter more particularly referred to, be held valid. That being so possessed thereof, the defendants, the mayor, aldermen and commonalty of the city of New York, have taken possession thereof, and through their agents have rented the same, or the greater portion thereof, for market and other purposes, to the other defendants in this action, and unless said lease be held valid, withhold from the said plaintiffs, the people of the state of New York, the possession thereof. That being such owners of said premises, as aforesaid, the commissioners of the land office, on behalf of the people of said state, and under and by virtue of the authority by law vested in them of the general care and superintendence of all lands belonging to the state, the superintendence of which is not vested in some other office or board, did duly make, execute and deliver to James B. Taylor and Owen W. Brennan, the plaintiffs, a lease of the premises for the term of one year from the 24th day of April, 1858, at the yearly rent of \$5000, payable quarterly in advance, and that under said lease, if the same be held valid, the plaintiffs, Taylor and Brennan, became lawfully possessed of said premises on the 1st day of May, 1858. That the plaintiffs, Taylor and Brennan, at the time of the execution and delivery of said lease, paid into the treasury of said state, the sum of \$1250, being the rent of said premises for the first three months of the term of said lease, and took

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a receipt therefor. The said plaintiffs, Taylor and Brennan, further alleged, that being so possessed of said premises, the mayor, aldermen and commonalty of the city of New York, claiming to own said premises, had taken possession thereof, as aforesaid, and through their agents had rented the same to the other defendants herein, who wrongfully withhold from said plaintiffs, Taylor and Brennan, the possession of said premises. That said Taylor and Brennan are legally entitled to the possession of said premises, under and by virtue of said lease as aforesaid, and to the rents, issues and profits thereof since the 1st day of May, 1858. That the parties now in actual possession of said premises, claim to hold as lessees or by permits from the mayor, aldermen and commonalty of the city of New York, and had been directed by the agents of said city, or those pretending to act as such agents, not to deliver possession thereof to said plaintiffs, or to pay to them the rents thereof, but to pay the same to the agents of said city or to those who claim to act as such, and to be duly authorized to receive them. That said tenants refuse to acknowledge the right of the plaintiffs, or to pay them the rent thereof, but pay the rent of said premises to persons who are, or claim to act as the agents of said city to receive the same. That but a small portion of the rents so collected have been heretofore paid into the city treasury, and the same or a greater portion thereof have been and will hereafter be lost to the parties entitled thereto by reason of the loose, careless, unauthorized and improvident manner in which said rents have been collected and paid over; and that the persons so acting or professing to act for the city in the collection of said rents are for the most part pecuniarily irresponsible, and some of them not duly authorized by the city to act, and the plaintiffs are apprehensive that unless they are restrained by the order of this court from the further collection of said rents, the same will be lost by the city and by the plaintiffs, who claim to be legally entitled thereto. That the occupants of the said premises pay and for several years last past have

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paid in the aggregate for the use thereof more than the sum of \$40,000 annually. That such rents are paid by the respective occupants of said premises weekly. That it would be the duty of the collector of the city revenue to collect and receive such rents if the same really belonged to the city ; that he does not collect the same, but the said rents are collected and received by a person or persons acting or pretending to act as collector or collectors of the market revenue. That the plaintiffs were also informed by Azariah C. Flagg, comptroller of the city of New York, that the city had received but a very small portion, if any, of the money collected for the aforesaid rents ; and the said Flagg had also informed the plaintiffs that inasmuch as he has been advised and believes that the said premises belong to the state, and therefore that the city has no legal right to collect and enforce the payment of the same, he has refrained from attempting so to do, and from exercising that control over it which as comptroller it would be his duty to do in case the same belonged to the city ; that many of the defendants are persons of little if any, pecuniary means, several of whom reside out of this state. That said defendants pay their rent weekly in advance, and that it is essential to the security of those entitled to collect and receive the said rents, that the same should be so paid, and if the same should not be so collected weekly, the same will be in danger of being wholly lost to the plaintiffs, inasmuch as most of the defendants are destitute of sufficient tangible property to pay the said rent if the same should remain in arrear for any considerable time ; that the said Flagg has several times stated to persons who have seen him on behalf of the plaintiffs, that in his opinion a receiver ought to be appointed to collect and receive the aforesaid rents ; that the same may be preserved during this litigation, to be paid over to the party who may, at the termination thereof, be adjudged entitled thereto ; and in order to prevent the same from going into the hands of parties many of whom are irresponsible and have no right thereto, whether the said property belongs to the

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city or the state. The plaintiffs demanded judgment against the defendants and each of them in favor of the plaintiffs or such of them as the court should adjudge entitled thereto, and that the rights of the several plaintiffs as between themselves and against the defendants and each of them might be declared and adjudged, and that the defendants might be adjudged to render possession of said premises to the plaintiffs, or to such of them as should be declared entitled thereto; and to pay to them jointly or severally the sum of \$100,000 damages for the rents, issues and profits of said premises whilst the same have been unlawfully withheld from the plaintiffs. And an injunction and a receiver were asked for.

The objections taken to the complaint, by the demurrer, are stated in the opinion of the court.

W. Hutchins and *E. W. Stoughton*, for the plaintiffs.

Charles O'Connor, *Wm. C. Noyes* and *Richard Busteed*, for the defendants.

SUTHERLAND, J. Before the code, when actions had names, this action would have been called an action of ejectment to recover the possession of certain real estate in the city of New York. The corporation of the city of New York, and about one hundred and sixty of the other defendants *jointly* demur to the complaint, on the following grounds: *First*. That it does not contain facts sufficient to constitute a cause of action. *Second*. That three separate and distinct causes of action are improperly joined, to wit: (1.) A cause of action by the people for improvident and unlawful management of property by the city corporation. (2.) An ejectment by the people, with a claim for damage. (3.) A like claim by Taylor and Brennan. *Thirdly*. That said three causes of action are not separately stated. *Fourthly*. That there is a defect of parties plaintiffs, by the improper joinder of Taylor and

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Brennan as plaintiffs, with the people, who being claimants adverse to the people, should be defendants.

The defendants, William H. Taylor, and a few others, separately demur to the complaint on the following grounds: *First*. That the complaint does not state facts sufficient to constitute a cause of action on behalf of the people. *Secondly*. That there is a defect of parties by the improper joinder of Taylor and Brennan with the people.

As was pertinently said on the argument, "the complaint is essentially a pleading under the code; it is without form." Two sets of plaintiffs by different attorneys, the people of the state, by Lyman Tremain, their attorney general, and Taylor and Brennan, by Slosson and Hutchins, their attorneys, come into court, and in the same complaint say, that the defendants unlawfully withhold the possession of certain premises in the city of New York, either from the people, or from Taylor and Brennan; and with other relief asked for, ask that the defendants "may be adjudged to render possession of the said premises to the plaintiffs, *or to such of them as shall be declared entitled thereto*; and to pay to them *jointly or severally* the sum of one hundred thousand dollars for the rents, issues, and profits of said premises whilst the same have been unlawfully withheld from the said plaintiffs."

The facts stated in the complaint to show a right to the possession, or a right of entry, in either the people, or in Taylor and Brennan; and to a judgment that either the people of the state, or Taylor and Brennan, recover the possession, with damages for the rents, and profits, &c., are substantially as follows: That the people of the state are now, and have been for many years, owners in fee of the premises, and are legally entitled to the rents, issues, and profits thereof since, *unless* a certain lease thereof to Taylor and Brennan (afterwards particularly described in the complaint, and a copy of which is annexed thereto) be held valid. That the mayor, aldermen &c. of the city of New York, have taken possession of the premises, and through their agents rented the same, or

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the greater portion thereof, for market and other purposes, to the other defendants in the action; and *unless said lease be held valid*, withhold from the plaintiffs, the people of the state, the possession thereof to *their* great damage and injury. That the commissioners of the land office, on behalf of the people of the state, by virtue of the authority vested in them by law, executed and delivered to Taylor and Brennan a lease of the premises for one year from the 24th day of April, 1858, at the yearly rent of five thousand dollars, payable quarterly in advance. That under said lease, *if the same be held valid*, Taylor and Brennan became lawfully possessed of the premises on the first day of May preceding the commencement of the action (May, 1858.) That Taylor and Brennan being so possessed of the premises, the mayor &c., claiming to own said premises, have taken possession thereof as aforesaid, and through their agents have rented the same to the other defendants, who wrongfully withhold from Taylor and Brennan the possession of the premises, to their great damage and injury. That Taylor and Brennan are legally entitled to the possession of said premises under the lease, and to the rents and profits thereof *since* the first day of May, 1858. That the parties now in the actual possession of the premises claim to hold as lessees, or by permits of the mayor &c., and have been directed by the agents of the city not to deliver possession thereof to the said plaintiffs, or to pay to them the rents thereof, but to pay the same to the agents of the city. That the tenants refuse to acknowledge the right of the plaintiffs, or to pay them the rent, but pay the rent to those who act or claim to act as the agents of the city to receive the same. That the occupants of the premises pay, and for several years preceding the commencement of the action, had paid in the aggregate, for the use of the premises, the sum of forty thousand dollars annually. These appear to be all the allegations in the complaint, bearing on the question of the right of possession, or to damage for the withholding the possession, or the rents, issues and profits. There are other allegations in

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the complaint, as to the loose and improvident manner in which the rents of the premises had been collected and paid over; the pecuniary irresponsibility and want of authority of persons professing to act for the city, in the collection of the rents; the danger that the rents will be lost by the city, and by the plaintiffs; the duty of Mr. Flagg, the city comptroller, to collect the rents if they belonged to the city; and his refraining from collecting the same, because he believed that the premises belonged to the state, and that the city had no legal right to such rent; the non-residence and want of pecuniary means of many of the defendants, &c.; but these last allegations appear to have been made for the purpose of obtaining the temporary injunction, restraining the city corporation from collecting the rents, and the receiver to take charge of the premises, and collect the rents, and the *general relief* asked for in the complaint.

From the wreck of forms effected by the code, and the alternating cases, strange mixture of allegations of fiction and of fact, alternative judgment and confused union of legal and equitable relief presented and asked for by the two sets of plaintiffs in this complaint, I have diligently and patiently tried to pick out one good cause of action, either in behalf of the people, or of Taylor and Brennan, against either the city corporation, or the tenants, alleged by the complaint to be in the actual occupation of the premises. I say allegations of *fiction* and of fact in the complaint, for it is evident that the allegation of actual possession by the people of the state, and by Taylor and Brennan, and of actual ouster by the mayor &c., actually or inferentially alleged in the complaint, were inserted therein, under the mistaken impression countenanced by a few reported cases since the code, that the fictitious (in most cases) allegations of actual possession by the plaintiff on a certain day, and of entry and ouster thereafter by the defendant, retained by the revised statutes out of the old fictions of the action of ejectment, had also been preserved by the code. (*See Ensign v. Sherman*, 13 How. Pr. R. 35; *Warner v*

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Nelligar, 12 *id.* 402.) But the first of these cases was reversed by the general term in the second district, (14 *How.* 439;) and I suppose it may be said to be pretty well settled now, that in an action to recover the possession of real estate under the code, it is only necessary for the plaintiff to allege in his complaint, that he is seised or possessed of some certain estate or interest in the premises, and entitled to the possession of the same; and that the defendant unlawfully withholds from him the possession thereof. (*Walter v. Lockwood*, (23 *Barb.* 228. *Sanders v. Leavy*, 16 *How.* 312.) It is not good cause of demurrer that there are too many plaintiffs or too many defendants. (*Peabody v. Washington Co. Ins. Co.*, 20 *Barb.* 340; 12 *How.* 134. 1 *Abbott*, 82. *Code*, § 144.) Nor is it good cause of demurrer, that the plaintiff asks in his complaint, for more than it shows he is entitled to; for relief that he is not entitled to; or for further relief than he is entitled to. Nor is the insertion in the complaint of redundant, or impertinent matter, or of irrelevant or unmeaning verbiage, cause of demurrer. If I understand the code, and the tenor and spirit of the decisions under the code, the plaintiff may present in his complaint a mass of heterogeneous facts, and a volume of unmeaning words, and any number of prayers for the most various and inconsistent relief; and none of these defects can be reached by demurrer, provided the complaint contains, no matter in what state of disorganization, the elementary constituents of a good cause of action. (*Watson v. Husson*, 1 *Duer*, 242. *Smith v. Greenin*, 2 *Sandf.* 702. *Richards v. Edick*, 17 *Barb.* 260. *Hammond v. Hudson River Iron and M. Co.*, 20 *Barb.* 386; 11 *How. Pr. R.* 218.) On demurrer to such a complaint, on the ground that it contains no cause of action, it is the duty of the court to uncover the mass of heterogeneous facts, and to sort out and arrange them; and if it is found that any lot or parcel of them, when arranged and placed together, will stand alone as a cause of action, it is the duty of the court to overrule the demurrer.

I do not think the theory of the complaint in this case is

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more than one cause of action. That cause of action is to recover the possession of the premises, and the rents and profits, as damages for the withholding the same. The plaintiffs are evidently in doubt which of them has the right to the possession, and to such damages; but I do not think that the theory of their complaint is that if it should turn out that Taylor and Brennan were entitled to recover the possession, and damages for the rents and profits of the same, since the execution of the lease to them, the people of the state also claim, and will be entitled to recover in this action damages for the rents and profits prior to the execution of the lease to Taylor and Brennan. Such claim, on the part of Taylor and Brennan for the possession and damages for the rents and profits, since the accruing of their right of entry; and on the part of the people of the state against either the city corporation, or the tenants in possession, or jointly against both, for damages for the rents and profits, prior to the accruing of Taylor and Brennan's title, could not be united in the same action before the code; and it would appear that they cannot be since the code. (*Leland v. Tousey*, 6 Hill, 328. *Ainslie v. The Mayor &c.*, 1 Barb. 169. *Tompkins v. White*, 8 How. Pr. R. 520. *Van Horne v. Everson*, 13 Barb. 531.)

It would appear from the complaint, that because § 167 of the code in speaking of causes of action which might be joined, specifies claims to recover real property, "with or without damages for the withholding thereof, *and the rents and profits of the same*," the plaintiffs supposed, that either the people, or Taylor and Brennan could recover in this action, with the possession of the premises, the specific rents paid or payable by the tenants in possession to the city corporation as their landlord—in other words, that by the code, while the action for the possession proceeded on the idea that the defendant was a trespasser, the claims for the rents &c., in the same cause of action, could proceed on the idea that he was a tenant of the plaintiff; and that thus the defendant could be treated as both a tenant and a trespasser in stating the same cause of

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action. From this idea probably proceeded the plaintiffs' allegations in the complaint, going to show that there was danger of the rents being lost; of improvident and careless management in the collection of the rents; of doubts of Mr. Flagg as to the title, &c.; and the prayer for an injunction, and a receiver, which have added so much to the confusion of the complaint.

But I suppose the code cannot justly be charged with the absurdity the complaint would appear to assume; I suppose that in an action under the code to recover the possession of real estate, the further claim and proceeding allowed in the action to recover the rents and profits, &c. are also allowed against the defendant as a trespasser; in other words, that they are allowed as a substitute for the action of trespass, and the suggestion on the record, for the mesne profits, before the code. (*Tompkins v. White, supra.*) In such action for the possession, or in a separate and independent action for the mesne profits, against the landlord or tenant, or both jointly, which probably could be brought now as well as before the code, (*see case in 6 Hill, supra,*) the plaintiff would be entitled to recover as damages what he could prove the premises were reasonably worth annually; and not, as a matter of course, the specific amount of annual rent which the tenant had paid or agreed to pay, or the landlord had received, or agreed to receive. Upon the whole, although I at first thought the complaint in this case was intended to contain a separate and independent cause of action on the part of the people for the rents and profits, prior to the execution of the lease to Taylor and Brennan; yet upon further examination, I think it was not intended to contain any claim for rents, and profits, and damages, for withholding the possession, or otherwise, except as incident to the claim and right to recover the possession. There is, therefore, not more than one cause of action in this complaint.

Are the facts in the complaint sufficient to constitute one cause of action by either the people of the state or by Tay-

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lor and Brennan, against either the city corporation, or the other defendants, the tenants in the actual occupation of the premises, for the recovery of the same, with or without damages, for the withholding thereof? This is the question; and I think the only question on these demurrers.

It is very clear that there is no cause of action by either the people, or by Taylor and Brennan, against the city corporation, for withholding the premises &c., stated in the complaint. The complaint shows, that the corporation does not withhold the possession of the premises; but that the tenants in the actual occupation, the other defendants, do. The complaint showing that the premises in question were actually occupied by the tenants of the city corporation, it shows that the plaintiffs had no right to make the city corporation a defendant in an action to recover the possession of the same. The rule of the revised statutes, that in such a case the tenants in the actual occupation should alone be made defendants, has not been altered by the code. (*Champlain and St. Lawrence R. R. Co. v. Valentine*, 19 Barb. 484, 493. *Van Horne v. Everson*, 13 id. 526. *Fosgate v. Herkimer Manuf. Co.*, 9 id. 287. *Van Santvoord's Pl.* 2d ed. 176, 7, 8, n. 1. *Shaver v. McGraw*, 12 Wend. 558. *Putnam v. Van Buren*, 7 How. Pr. R. 31.) Had the city corporation demurred separately in this case, on the ground that there was no cause of action stated in the complaint against it, I should have sustained the demurrer; but the demurrer being a joint demurrer by the corporation and most of the other defendants, the demurrer must be overruled, if the complaint shows a cause of action by the people, or by Taylor and Brennan, against such other defendants. (*Eldridge v. Bell*, 12 How. 549. *Philips v. Hagadon*, Id. 17. *Brownson v. Gifford*, 8 id. 392. *Van Santvoord's Pl.* 671.) We have arrived, then, at this question on these demurrers: does the complaint show a cause of action by either the people of the state, or Taylor and Brennan, against the defendants, who are alleged to be in the actual occupation of the premises as tenants of the city corporation? On the theory which evi-

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dently dictated the complaint, I think it does not. It is evident that the complaint assumes that the rule that a conveyance of lands held adversely is void, and gives no right of entry to the grantee, applies to conveyances by the people of the state. Hence, the two sets of plaintiffs, the alternative prayer for judgment, and some of the other peculiarities of this complaint. The complaint was evidently intended to meet the plea of adverse possession at the time of the execution of the lease to Taylor and Brennan, which it was supposed the defendants could or might set up. This, by the revised statutes, could be done by naming the grantor and grantee as plaintiffs, in different counts. (*Ely v. Ballantine*, 7 Wend. 470.) But I suppose that this privilege of fiction has fallen before the realities of the code, and that now by the code the action must be brought in the name of the real party in interest. (§ 111.) The code supposes that the plaintiff knows both the law and the facts of his case, so as to verify it by his oath; and does not permit him to speculate, by stating the case, or his case, in different ways in different counts; and I do not think it intended to make an action for the recovery of real property an exception.

If it were the law, as the plaintiffs appear to have assumed, that a conveyance by the people of the state, of lands held adversely, is void, I should not be able to find any cause of action whatever in the complaint—for the complaint, while it alleges title in the people, the execution of the lease to Taylor and Brennan, and their right to the possession without qualification or condition, also contains other allegations of fact, from which it would appear that when the lease to Taylor and Brennan was executed, the premises were actually held and occupied by the tenants of the city, claiming under title adverse to that of the state; and these contradictory allegations in effect—in stating one and the same cause of action; the first showing a right in Taylor and Brennan to bring the action; and the second showing the lease to Taylor and Brennan void, and therefore, showing a right in the people of the

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state to bring the action—would neutralize each other, and probably leave the complaint without any cause of action certainly and sufficiently stated, in either the people, or in Taylor and Brennan. But the complaint was plainly dictated under an error as to the law. Neither the common law rule, nor the statute making conveyances of land held adversely void as to the party in possession, applies to conveyances by the people of the state, or by public officers duly authorized. Such conveyances are not within the reason of the common law rule, nor of the statute; and strictly, there can be no adverse possession as against the people; the people of the state cannot be dis-seised. (*Jackson v. Gumaer*, 2 Cowen, 552. *Allen v. Hoyt*, Kirby, 221. *Barney v. Cutler*, 1 Root, 489, 491. *La Frombois v. Jackson*, 8 Cowen, 589.)

It follows that the lease to Taylor and Brennan was valid, and gave them a right of entry, although the premises at the time were actually held and occupied under a title hostile to the title of the state; and having the right of entry, Taylor and Brennan could bring their action to recover the possession of the same, and the rents and profits since the execution of the lease as damages, &c. The complaint contains this cause of action on the part of Taylor and Brennan alone, against the defendants, the tenants in the actual occupation of the premises, alone; but this is sufficient to save the complaint on this joint demurrer by the city corporation, and the other defendants. The plaintiffs must, therefore, have judgment on the demurrer, with liberty to the defendants, or such of them as have not answered, to answer in twenty days on payment of costs.

In arriving at this conclusion, I have assumed that it sufficiently appears that the commissioners of the land office were authorized to execute the lease to Taylor and Brennan. By Laws of 1819, page 300, § 3, the commissioners of the land office may lease for a term not exceeding one year, any lands belonging to the state, having improvements on them. It is not alleged in the complaint, that the premises leased to Tay-

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lor and Brennan had improvements on them ; but it is alleged that the lease was duly executed by the commissioners under the authority by law vested in them ; and as public officers are to be presumed to do their duty, and to act within the powers given them by law, unless the contrary appears, I think it sufficiently appears that the commissioners had power to execute the lease to Taylor and Brennan.

[NEW YORK SPECIAL TERM, October 28, 1858. *Sutherland*, Justice.]

BEACH, receiver, &c.. vs. SMITH.

A payment in money, *eo nomine*, at the time of subscribing to the capital stock of a rail road company, is not necessary to the validity of the subscription, under the 4th section of the general rail road act, which requires the payment of ten per cent in money, by each subscriber, at the time of subscribing. A subsequent payment will operate as a waiver of the condition, and the party making it will be considered as recognizing his original liability.

Where a party, while engaged as an agent of a rail road company, in procuring subscriptions to the capital stock, receiving the first payment of ten per cent thereon, and performing other services for the company, for which it was indebted to him, made a subscription of \$500 to the capital stock, on his own behalf, without, however, in form, paying the ten per cent thereon, to himself or any one else, at the time, but subsequently, on calls for installments being made, by the directors, he presented an account to the company, making a charge of \$450 for his services and expenses as agent, and crediting the sums paid to him by the subscribers to the stock, and also the original ten per cent on his own subscription, and the amount of a call of ten per cent then payable, and struck a balance against the company of \$200, which account was allowed, and the balance paid to him, by the treasurer; *Held* that under the circumstances, it was not necessary for the party to pay to himself, as agent, ten per cent, at the time of subscribing, in order to render his subscription valid and binding; but that if there were any defect in such subscription, he by his subsequent conduct ratified the subscription and recognized his continuing and existing liability thereon, and was bound thereby. W. F. ALLEN, J., dissented.

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APPEAL from a judgment rendered at a special term, after a trial at the circuit. The Ogdensburgh, Clayton and Rome Rail Road Company was organized on or about the 22d day of April, 1853. The defendant was employed by it to procure subscriptions to the capital stock of said rail road company, and to negotiate for procuring rights of way over lands necessary to be appropriated for said road. Being so engaged, and on the 2d day of July, 1853, the defendant himself made a subscription to the stock of the company of five hundred dollars. About the same time he procured subscriptions to be made by other persons than himself, and in some instances received from the subscribers as the agent of the company the payment of ten per cent in cash, by law required to be paid at the time of subscribing. The directors of the rail road company afterwards, and in October, 1853, made four several calls upon the subscribers to the capital stock of the company, each of ten per cent, falling due at intervals of three months, the first of which became due February 1, 1854. On the 25th of February, after the first call became due, the defendant rendered an account in writing to the company, signed by him, in which he charged the company for his services, subsequent to April 1, 1853, as agent in procuring \$7700 subscriptions to the capital stock of the company, in procuring right of way in Lewis and Oneida counties, and personal expenses therein, the sum of \$410. He credited the company as for cash received for original ten per cent paid him by subscribers to the company's stock, including his own subscription, and for the call due February 1, 1854, on his own subscription and that of another subscriber, in all \$210, and claimed a balance due him from the company of \$200, which latter sum was paid to said Smith by the treasurer of the company and receipted by said Smith on the 27th day of February, 1854.

This action was brought by the receiver of the rail road company, appointed at the suit of a judgment creditor of the company, to recover of the defendant several calls on his sub-

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scription to the stock of the company, falling due subsequent to February 1, 1854. The defendant insisted that his subscription was not obligatory upon him, and that the plaintiff could not recover, for the reason that, as he alleged, ten per cent in money was not paid by him to the company at the time of his subscribing, upon the amount of his subscription.

The cause was tried at the Oneida circuit. His honor, the circuit judge, upon these facts held as conclusions of law: 1. That upon the facts the plaintiff could not recover. 2. That the payment of the ten per cent upon the defendant's subscription, shown by his account rendered to have been made by applying the same on his account for services, was not a sufficient compliance with the statute, and did not make his subscription obligatory upon him. 3. That the payment of an installment subsequent to the first ten per cent, shown by the defendant's account rendered to have been made by applying the same on his account for services, was not such a ratification and recognition of his subscription as made it obligatory upon him. 4. That the defendant's subscription was void. 5. That the plaintiff must be nonsuited, and he accordingly ordered a judgment of nonsuit; from which judgment the plaintiff appealed to the general term.

T. Jenkins, for the appellant. I. The defendant was *agent of the company* to procure subscriptions, with authority also to receive from subscribers the ten per cent in money required to be paid at the time of subscribing. His agency commenced April 1, 1853. He subscribed July 2, 1853. He obtained subscriptions to the amount of \$7700, and received in many instances the ten per cent in cash paid by the subscriber. Payments to him were payments to the company; from the moment he subscribed, he was, as between himself and the company, chargeable for cash received by himself on his own subscription to the amount of ten per cent thereon. It was money in his hands belonging to the company equally with the ten per cent paid to him by other subscribers. (*Highland*

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Turnpike v. McKean, 11 *John. Rep.* 98. 1 *R. S.* 4th ed. 1220, § 4. 7 *Barb.* 567-72. *Id.* 167. 21 *Wend.* 211-18. 1 *Kern.* 102.)

II. The defendant cannot take advantage of his own wrong to avoid legal responsibility to the creditors of the rail road company. He was the agent of the company; he knew it was necessary that ten per cent should be paid in money at the time of subscribing; he subscribed, and is estopped from denying that he did the other act necessary to make his subscription obligatory.

III. It is not the true meaning of the last clause of section 4 of the general rail road act, that unless the subscriber pays ten per cent in money to the directors of the company at the time of subscribing, his subscription shall be *void*. Certainly not as against creditors of the company who have dealt with it on the faith that the apparent subscriptions to the capital stock are real.

IV. At most, the contract of subscription was *voidable*, while the ten per cent was unpaid. When paid, though subsequent to the subscription, the contract became obligatory and binding on both parties, equally as if at the time of such subsequent payment, the subscriber retraced with his pen the letters of his signature on the subscription book.

V. On the 28th day of February, 1854, the defendant, if not before, paid ten per cent in money to the directors of the company on his subscription; that is the legal effect of the transaction which then took place; Smith paid the company two hundred and ten dollars in money, including his first ten per cent, and the company paid him at the same time four hundred and ten dollars in money in full of his account for services. The legal effect of the transaction was the same as if Smith had given the company his check for \$210, and received back theirs for \$410.

VI. But, beyond this: Smith has not only ratified the original act of subscription by subsequent *payment* of the first ten per cent, but he has gone farther. If that payment was

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not sufficient to oblige him to go farther when called upon, he voluntarily went farther, and again ratified the original act of subscription by paying the call of ten per cent due February 1st, 1854. It was not necessary that *that payment* should have been in money to be a good and binding payment. After the payment had been made on the one side and received on the other, neither party could deny the obligation of each to the other. Smith was entitled to the rights of a stockholder, and subject to the liabilities of a stockholder. Smith has *actually paid*, not only the first ten per cent required to be paid at the time of subscribing, but he has *actually paid* another ten per cent upon the subscription. Both payments were accepted and received by the company. If the court should be of the opinion that by reason of the mode in which the first ten per cent was paid, it was not a strict compliance with the act, and that there was still a *locus penitentie* remaining to Smith, he conclusively waived it, and ratified and reaffirmed his subscription by payment of the call due February 1, 1854.

G. W. Smith, defendant, in person. I. Ten per cent was not paid at the time of making the subscription, and the contract of subscription was therefore illegal and void, and no recovery can be had on the same. (1 *R. S.* 1222, 4th ed. § 4. *Laws of 1850*, ch. 140, § 4. *Crocker v. Crane*, 21 *Wend.* 211.) This is illegal and void, as being, (1.) Against the express language of the statute. (7 *Wend.* 31, 276. 20 *John.* 397.) (2.) As against its spirit and policy. (*Id.* 4 *Hill*, 424. 10 *Wend.* 431.) There can be no soundness in the suggestion that the statute is directory merely. Language seems to be employed to exclude any such argument. It is first said that the subscriber shall pay the ten per cent. The clause is then added, expressly prohibiting the taking of any subscription where the ten per cent is not paid. The idea of a directory statute can never be applied to the case of a prohibition, where a thing is positively forbidden to be done. It is only

applicable to cases where affirmative directions are given. (*Smith's Com.* 780, &c.)

II. There can be no ratification or affirmance of the contract, that can make it binding. (1.) The difficulty is not, that the contract was not clearly made, nor that it was not fully proved, and this is all that a ratification can establish, but that being so made and proved, it is in and of itself illegal and void. (2.) An illegality can never be ratified or affirmed, except by a legislative act removing the prohibition. The taint remains, and extends through all renewals or changes of the original contract. (*Hook v. Gray*, 6 Barb. 398. *Nellis v. Clark*, 4 Hill, 424. 1 *id.* 11, 16. 3 *Denio*, 70. 3 *Seld.* 328.)

III. Corporations must acquire their franchises and exercise the powers granted them in strict pursuance of the statute creating them. They have no original capacity, like individuals, to make contracts, and their contracts can only be such as the statute enables them to make, in essence, mode and form. Unless the prescribed mode be followed, no valid contract is made. (2 *Cranch*, 127. 4 *id.* 403. 9 *id.* 64. 4 *Wheat.* 77. 5 *id.* 116. *Smith on Stat.* § 679, 80.) 2 *John.* 109. 7 *Cowen*, 462. 13 *Peters*, 587.)

IV. The clause in question is a statutory prohibition upon the company; they alone are in fault. The defendant could maintain his action upon the contract, but the company cannot sustain one against him. (*Tracy v. Talmage*, 4 Kern. 179, 384. *Curtis v. Leavitt*, 1 E. P. Smith, 9.)

BACON, J. I should be very well satisfied if I were able to uphold the judgment rendered by my brother Allen in this case. The unfortunate rail road enterprise which the plaintiff, as receiver, represents, has already swallowed up, past recovery or redemption, several hundred thousand dollars of the hard earnings of the subscribers to the stock, without the least hope of any adequate return or indemnity. I do not wonder at the reluctance with which these calls are met, and am disposed to listen favorably to any fair and legitimate de-

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fense that can be made to their enforcement. But unless we are prepared to abandon some of the doctrines upon which we have proceeded, and the decisions we have made, both at special and general terms, I am unable to see how the defendant in this case can be exempted from liability.

The facts in this case, upon which the question of law arises, are undisputed, and are in substance these: that the Ogdensburgh, Clayton and Rome Rail Road Company was incorporated in April, 1853, and the defendant immediately thereupon became engaged as an agent for the company in procuring subscriptions, and negotiating for the right of way, and between that month and the 25th of February, 1854, procured subscriptions to the amount of \$7700, and in several instances received the 10 per cent on the subscriptions thus obtained. While thus engaged, and in July, 1853, he made a subscription on his own behalf of \$500, to the stock of the company; paying, however, nothing in form to himself or any one else upon such subscription. Subsequently to this, calls for installments upon the stock of the company were made by the directors; the first falling due on the 1st of February, 1854. On the 25th of February, after this call was due, the defendant presented an account to the company, making a charge of \$450 for his services theretofore rendered and expenses incurred in the course of his agency, and crediting the sums paid to him by the subscribers to the stock as such agent, and also the original 10 per cent on his own subscription, and the first call of 10 per cent, being all that was then payable, and struck a balance against the company of \$200, in cash, which was allowed, and on the 27th of February paid to him by the treasurer of the company.

The 4th section of the general act rail road requires that every subscriber, at the time of subscribing, shall pay to the directors 10 per cent on the amount subscribed by him, in money, and forbids any subscription to be received or taken without such payment. (*Laws of 1850, ch. 140, § 4.*) The defendant insists that as 10 per cent was not paid by him at the time

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of subscribing, in money, the contract of subscription was wholly void, and no recovery can be had thereon. The case principally relied upon to sustain this proposition, is *Crocker v. Crane*, (21 *Wend.* 211.) That was a suit instituted to recover upon a check given for a subscription to the stock of a rail road corporation, the charter of which provided that the company should receive no subscription "unless two dollars on each share subscribed be paid at the time of subscription." The marginal note of the reporter states, as a point decided by the court, that the company was not authorized to receive checks in payment of the sum required to be paid, but that specie, or its equivalent current bills of specie paying banks, must be demanded. Looking at the facts in that case and the opinion of the court, it is manifest that they intended to hold no such broad proposition as this. The evidence showed, clearly, that the check in question, among many others, was taken in lieu of uncurrent funds, and that it was well understood that the drawers had no funds in the bank, and that the checks would not be presented for some time for payment. Cowen, justice, after recapitulating the facts, says that on reading the evidence he feels no doubt that the whole was a mere evasion of the statute, and that the transaction was evidently the substitution of individual credit for cash payment. I think it clear that if the receiving of the check had been an isolated transaction unconnected with the understanding that there were no funds to meet it, it would have been held a payment; within the provision. Indeed Judge Cowen says, in so many words, "I do not deny that receiving an occasional check might have been a fair substitute." And he adds that checks are received because they operate as a mere transfer of money which a man has at his banker's. It cannot be doubted then that a check or sight draft on a banker would be a good payment in money, under the 4th section of the rail road act, where no suspicion attaches to the transaction and no pretense exists that the parties are practicing a sham. In the case of this same rail road against Davis, decided by this court at the

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last April general term, we held that a sight draft, drawn by the defendant at Ogdensburgh, on a bank in the state of New Jersey, which the treasurer of the company subsequently received credit for, was equivalent to a payment in money at the time of subscribing, and a sufficient compliance with the requisition of the statute.

In the case of *Beach v. Hazard*, tried before me in September, 1857, it appeared that the defendant paid nothing at the time of subscribing, but that subsequently, after three calls had been made upon his stock, he gave his note for the ten per cent and the amount of the calls, and paid the note after maturity. The suit was brought to recover three other calls afterwards made, and I held and decided that the defendant was not discharged from liability on his subscription by his failure to pay ten per cent at the time of subscribing, but that the payment of the same, with the subsequent calls, operated as a waiver of the condition and a recognition of his continuing liability on his subscription. Judgment was accordingly rendered for the plaintiff for the subsequent calls, and the defendant acquiesced in the decision and paid the amount demanded in the suit. In the case of *The Utica and Black River R. R. v. Clarke*, which was before us on appeal at the last July term, it appeared that the defendant, on the trial, offered to show that he paid nothing at the time of subscribing, but gave merely a memorandum check drawn on a bank where it was, at the time, understood that there were no funds to meet it, but conceding that he had subsequently paid \$400 in cash, which included the ten per cent and three calls on the stock. The referee rejected the offered evidence, on the ground that the subsequent payment on the subscription was an affirmation thereof, and rendered it valid and binding as if an original payment had been made. To this ruling there was an exception, and on appeal we affirmed the judgment; thus holding with the referee on this as well as on other questions involved in the case.

The points decided, and the principles recognized, in these

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cases are, it seems to me, a conclusive answer to this defense. A payment in money, *eo nomine*, at the time of subscribing is not necessary to the validity of the subscription, and a subsequent payment will operate as a waiver of the condition, and the party making it will be considered as recognizing his original liability. At the time the subscription in this case was made by the defendant he had been for several months in the employment of the company, soliciting subscriptions and rendering other services, and was earning a compensation for which they were then indebted to him. He could have gone through the form of taking from one pocket the \$50 which he was required to pay to himself, as agent of the company, on making the subscription, and then transferring it to the other as already earned in the service of the company and justly due to him; but it would have been a very idle ceremony. Indeed, according to the doctrine advanced in the case of *Highland Turnpike Co. v. McKean*, (11 John. 98,) even this ceremony would have been unnecessary. The defendant in that case was a commissioner to receive subscriptions to the stock of the Highland Turnpike Company, the charter of which provided that every subscriber should, at the time of subscribing, pay to either of the commissioners five dollars on each share by him subscribed. While the book was in the hands of the defendant as commissioner, he subscribed for twenty shares, paying, however, nothing at the time. This, says the court, was a valid subscription so as to entitle the defendant to the stock. "It would be a useless ceremony," say they, "for him to pay himself the money required to be advanced on his subscription."

But beyond this, when the defendant, in February, 1854, presented his account to the company, charging himself and crediting the company with not only the ten per cent but the first instalment called upon his stock, he, in the most express and emphatic manner ratified his subscription and recognized his continuing and existing liability thereon. It is a perversion of the language and intent of the section, it seems to me,

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to insist that by the failure to pay the ten per cent at the instant of subscribing the subscription itself was thereby rendered utterly void, and that consequently there can be no affirmance or ratification that can make it binding. It is not like the case where a statute provides that a certain act shall be done, and declares that a failure to comply with a condition annexed to it shall render the act attempted to be done void, and discharge any right or liability sought to be derived from or attached thereto. There is no such provision nor declaration in this case. Nor was the defendant's contract void by reason of the doing or omission to do any thing that was *malum in se*. It was a perfectly lawful act not only, but for a public object that was apparently meritorious.

Assuming that by the omission to comply with the strict letter of the statute in not placing the money in his own hands at the instant he dropped the pen with which he made the subscription, the defendant could have repudiated the contract, and declined thereafter to fulfill any of its obligations; yet he chose to pay, subsequently, and not to disaffirm the contract; and it would be strange indeed if after this the law will interpose, and either ignoring or putting aside the voluntary act of the party recognizing his liability, declare that he shall not be bound because he omitted a ceremony in the beginning which he took the earliest opportunity which subsequently occurred to atone for and supply. When the defendant presented his account, in February, charging the company for his services and crediting the ten per cent and the first installment on his subscription, and received from them in cash the balance of his demand, the legal effect of the transaction was precisely the same as if he had given the company his check for two hundred dollars, being the amount due them, and received from the company theirs for \$400, the entire amount of his account. No one would have doubted that this would have been a payment in money on his subscription, which, in accordance with the principles settled by, and acted on in this court, would have operated to ratify and confirm

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his subscription. No difference in substance can be perceived between such a transaction and the one which actually took place between the parties in this case.

It cannot be questioned, I think, that the effect of this settlement was an affirmance on the part of the defendant of his liability upon his subscription, and on the part of the company a recognition of his standing in that precise position which entitled him to be thus regarded. He could claim all his rights as a stockholder and the company would have been bound to concede them. An attempt on their part to evade any claim which he might lawfully make as a stockholder could have been successfully resisted by the defendant. It would not have been listened to for a moment in any legal tribunal, and I think the right and the duty are reciprocal, and both equally attach to and are binding on the defendant.

I am of opinion that the judgment should be reversed, and a new trial granted, with costs to abide the event.

MULLIN, J., concurred

W. F. ALLEN, J., dissented.

Judgment reversed.

[ONONDAGA GENERAL TERM, October 5, 1858. *Bacon, W. F. Allen and Mullin, Justices.*]

 STANBRO vs. HOPKINS.

Notwithstanding the present constitution makes all persons *competent* witnesses, whether they be believers in a Supreme Being, or atheists or infidels, yet a party against whom a witness is called may interrogate him, on his cross-examination, as to his opinions on matters of religious belief, and show by him that he does not believe in the existence of a God who will punish false swearing.

And it is not erroneous for the judge to charge the jury that the fact thus proved will go to the *credit* of the witness.

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Where, in an action to recover the possession of personal property to which the plaintiff claims title under a chattel mortgage executed to him by a third person, and which property the defendant claims to hold as a bona fide purchaser for value from the mortgagor after the lapse of a year from the filing of the mortgage, if it is shown that he purchased without notice of the mortgage, and there is no evidence that the mortgagor owed any person other than the mortgagee at the time of the sale to the defendant, it cannot be presumed that the defendant purchased the property with intent to defraud the creditors of his vendor.

It is therefore erroneous to charge the jury that if they believe from the evidence that the defendant purchased the property with intent to defraud the creditors of the vendor, the plaintiff is entitled to a verdict, although they should find that the defendant did not know of the plaintiff's mortgage, or of the debt then due to him.

THIS was an action to recover the possession of personal property. The plaintiff claimed title to the property under a personal mortgage executed to him by Thomas C. Hopkins. The defendant claimed to hold the same as a bona fide purchaser for value from the mortgagor, subsequent to one year from the time the mortgage was filed. The defendant testified that he had no knowledge of the existence of the mortgage at the time he purchased the property. The plaintiff gave evidence that tended to show the defendant knew of the mortgage when he bought the property. There was no evidence that the mortgagor owed any person other than the plaintiff when the defendant purchased the property.

The action was tried at the Chenango circuit, in February, 1858, when the plaintiff obtained a verdict for the property, the value of which the jury assessed at \$255.50. The defendant made a motion for a new trial, upon exceptions. The exceptions and rulings to which they were taken sufficiently appear in the following opinions.

Rexford & Kingsley, for the plaintiff.

Sherwood S. Merritt, for the defendant.

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BALCOM, J. Woodbridge Spencer was a witness for the defendant, and gave material evidence for him. On his cross-examination the plaintiff, under the defendant's objection and exception, was permitted to show by him, (the witness hesitating to answer,) that he did not believe in the existence of a Supreme Being who will punish false swearing. And the judge charged the jury that such fact might go to the credit of the witness; to which the defendant's counsel excepted.

The jury could not have understood from the charge that, as matter of law, Spencer's disbelief in the existence of a Supreme Being who will punish false swearing, affected his credibility; but only, if they were of the opinion it ought to render his evidence less reliable, they might so regard it.

The supreme court of this state decided, in 1820, that a person who did not believe in the existence of a God, nor in a *future state of rewards and punishments*, could not be a witness in a court of justice, under any circumstances. (*Jackson v. Gridley*, 18 *John*. 98.) In 1823 the same court held that "one who believed in the existence of a God, who will punish him if he swears falsely, is a competent witness." (*Butts v. Swartwood*, 2 *Cowen* 431. *The People v. Matteson*, *Id.* 433.) The legislature afterwards passed a law, which took effect on the first day of January, 1830, in which it was declared that "every person believing in the existence of a Supreme Being, who will punish false swearing, shall be admitted to be sworn, if otherwise competent." (2 *R. S.* 408, § 87.) And in 1842, Greenleaf, in his treatise on evidence, said: "It may be considered as now generally settled, in this country, that it is not material whether the witness believes that the punishment will be inflicted in this world or in the next. It is enough if he has the religious sense of accountability to the Omniscient Being, who is invoked by an oath." (1 *Greenl. Ev.* § 369.) It seems that the English rule then was, that a person must believe there is a God and a *future state of reward and punishment*, or he could not be admitted to be sworn as a witness. (*See* 1 *Phil. Ev. Cov. & Hill's ed.*

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p. 21 ; see *Notes on same subject*, vol. 1, pp. 62, 63 ; *id.* vol. 2, p. 1503 ; 3 *Blk. Com.* late ed., note 29, pp. 285, 286 ; 1 *Atk.* 4 ; *B. N. P.* 202 ; *Peake's Rep.* 11.)

The people of this state have since declared in their constitution, which became in force on the first day of January, 1847, that "no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief." (*Const. art.* 1, § 3.)

Under the old common law rule, by which persons were rejected as witnesses, from defect of religious sentiment and belief, the incompetency of a person to be a witness, for such cause, was never presumed ; nor, as a general rule, could a person, who was objected to for such cause, be interrogated respecting his religious belief. His defect of religious sentiment and belief had to be established by proof of his previous declarations and conduct. (*See authorities cited supra* ; also see 1 *Greenl. Ev.* § 370.) And this general rule was made statutory in this state on the first day of January, 1830, when it was enacted by the legislature that "No person shall be required to declare his belief in the existence of a Supreme Being, or that he will punish false swearing, or his belief or disbelief of any other matter, as a requisite to his admission to be sworn or to testify in any case. But the belief or unbelief of every person offered as a witness, may be proved by other and competent testimony." (2 *R. S.* 408 § 88.)

There are cases in the books in which the general common law rule, above mentioned, was departed from. In one case Buller, J., held that "the proper question to be asked of a witness is, whether he believes in God, the obligation of an oath, and in a future state of rewards and punishments." (*Peake's R.* 11.) In a note in Blackstone's Commentaries the editor remarks, "I have known a witness rejected, and hissed out of court, who declared that he doubted of the existence of a God, and a future state." And Phillips says, "The proper mode of examining a witness, for the purpose of trying his competency in religious principle, is not to question him as to

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his particular opinions, but to inquire generally, whether he believes in the existence of God and of a future state." (1 *Phil. Ev.* 24, *Cowen & Hill's ed.*)

The reason that was generally assigned for the rule which prohibited the interrogation of the person offered as a witness, as to his religious opinions, when objected to for defect of religious sentiment and belief, was "that it would be incongruous to admit a man to his oath, to ascertain whether an oath had any binding influence on his conscience." (See *Jackson v. Gridley*, 18 *John.* 104.) But this reasoning is inapplicable to the question under consideration, and to all similar ones arising under the state constitution now in force; for that instrument makes all persons competent witnesses, whether they be infidels or atheists or believe they are "like the beasts that perish." And inasmuch as persons who do not believe in the existence of a Supreme Being who will punish false swearing, are now competent to testify on oath, touching all matters in issue, on a trial, I am unable to perceive any good reason why the party against whom they are called may not interrogate them, on their cross-examinations, as to their opinions on matters of religious belief, instead of calling other witnesses to prove such opinions.

The constitution has not expressly abrogated the statute above quoted, which shielded persons from declaring their religious opinions, as a requisite *to their admission to be sworn or to testify*, in any case, for it agrees with such statute, when it declares, "no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief." But as no person can now be excluded as a witness for defect of religious sentiment and belief, by reason of this constitutional provision, the statute above mentioned is a dead enactment.

The question to be determined is not what questions may be put to persons to test their competency to be sworn at all, but whether witnesses, after they have been sworn, may be interrogated on their cross-examinations, as to their opinions on

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matters of religious belief, for the purpose of affecting their credibility, if the court and jury should think their opinions, when elicited, ought to render their evidence less reliable; therefore neither the constitution nor any of the statutes to which I have alluded will control the decision we are to make.

Persons may be competent witnesses and not credible ones. And when the people declared, in their constitution, that "no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief," they did not intend to say that some persons may not have such awful religious opinions as to render them less credible as witnesses than others. The occupation of a witness may be so abhorrent as to affect his credibility; and a person's religious views may be so shocking as to afford evidence of great obliquity of mind, and of the grossest moral depravity. To say that a person whose religion teaches him that his happiness will not be diminished in time or eternity by the utterance of falsehood as a witness, is entitled to equal credit, in a court of justice, with one who believes the doctrines of the sacred scriptures, is extremely absurd. (*See 17 Wend. 460.*)

The policy of the common law has ever been to permit those who are to pass upon the testimony of a witness, to see, as far as outward indications will allow, what is passing in his breast at the time he testifies. Hence a witness may be required to disclose, on cross-examination, his present situation, employment and associates; as for example, in what house or family he resides, what is his ordinary occupation, and whether he is intimately acquainted and conversant with certain persons, and the like; for however these may disgrace him, *his position is one of his own selection.* (*1 Greenl. Ev. § 456.*)

It has been held in states where persons are excluded as witnesses, for defect of religious sentiment and belief, that if the ordinary oath is administered to a witness, without his making any objection to its form, he may be afterwards asked whether he thinks the oath binding on his conscience. (*Id. § 371.*) And I think, inasmuch as the barrier against admit-

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ting unbelievers in any thing heavenly or divine to testify has been thrown down in this state, witnesses may be compelled to disclose, on cross-examination, their opinions on matters of religious belief; for however awful their opinions may be, they are of their own choosing. This rule only carries out that doctrine of the common law which permits the laying open, as far as possible, the minds of witnesses to those who are compelled to pass upon their evidence. I have no fears that this rule will encourage parties to scandalize truly religious witnesses by imputations that they profess the worst of creeds. For so long as no religious test shall be required for judges and jurors, parties will be loth to cross-examine witnesses as to their opinions on matters of religious belief, unless they are well assured the opinions of the witnesses are very obnoxious to the sentiments of citizens who say with Pope,

“For modes of faith let graceless zealots fight,
His can't be wrong whose life is in the right.”

My conclusion is that the judge committed no error in his ruling or charge to the jury on this branch of the case.

Another question is presented by the exceptions, which I will now consider.

No evidence was given that Thomas C. Hopkins was indebted to any person except the plaintiff at the time the defendant purchased the property in dispute of him. The judge must have supposed that some evidence had been given that he had creditors at the time he sold the property to the defendant; for he charged the jury, if they believed from the evidence that the defendant purchased the property in question, with intent to defraud the creditors of Thomas C. Hopkins, the plaintiff was entitled to their verdict, although they should find that the defendant did not know of the plaintiff's mortgage, or of the debt to the plaintiff, at the time of such purchase.

If the defendant did not know that Thomas C. Hopkins owed the plaintiff, or that the plaintiff held the mortgage against him, on which the plaintiff claimed the property in dispute, the defendant had no knowledge whatever, for aught

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that appears by the evidence, that Thomas C. Hopkins had any creditor; and therefore he could not have purchased the property in dispute with intent to defraud any body.

The jury were permitted to assume or imagine without evidence that Thomas C. Hopkins had creditors; or they may have supposed the charge authorized them to do so. For this reason I think the charge on this branch of the case was erroneous. (*See Burr v. Broadway Ins. Co.*, 2 *E. P. Smith*, 267, 272, 274.) And on this ground I am of the opinion there should be a new trial granted; with costs to abide the event.

CAMPBELL, J. The objection that the plaintiff had incumbered the land was not well taken. It would not necessarily prevent the plaintiff from performing his contract.

The question whether the witness Spencer could be inquired of as to his religious belief, and whether that could be submitted to the jury, is one of interest, though one upon which I think there ought not to be much doubt or difficulty.

The first constitution of this state, adopted in 1777, and drawn up principally by that eminent jurist and christian statesman John Jay, contained the following section, (§ 38:) "And whereas, we are required by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance, wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind; this convention doth further, in the name, and by the authority, of the good people of this state, ordain, determine and decree, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this state to all mankind, *provided* that the liberty of conscience hereby *granted* shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

All of this section, with the exception of the preamble, was re-adopted in the constitution of 1821. A single word only

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was altered. The word *secured* was substituted for the word *granted* in the proviso. It was declared by the change that liberty of conscience was a natural right, and not one derived from government. The constitution secured it. It was not granted.

In the present constitution the same provision is contained, with the following words inserted before what was the proviso in the former constitutions: "And no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief." The statute law in force at the time of the adoption of the present constitution (2 R. S. 408, § 87,) was as follows: "Every person believing in the existence of a Supreme Being who will punish false swearing, shall be admitted to be sworn if otherwise competent." The constitution now makes him *competent* whether he believes in a Supreme Being or not.

It was distinctly stated in the convention, by the mover of the amendment, as follows: "If there was any thing thus affecting his credibility, let it go to the jury. Let it go to his credit, and not to his competency." The amendment which was voted down in the convention, was one which allowed evidence to be given as to the belief of the witness, in order to affect his credibility. As the law stood, no person was required to state his belief as a *requisite* to his *admission* to be sworn, "but the belief or unbelief of every person offered as a witness, may be proved by other and competent testimony." This latter provision the convention would not adopt. In the organic law of the state it was intended that the question of competency alone should be settled. No testimony would be allowed on the question of competency. That was settled. So, more recently by statute the question of interest has been disposed of, in a similar manner. The parties are competent witnesses for themselves. Interest does not exclude them. But the question of credibility still remains, and must remain so long as justice is administered by fallible men. No constitution, no statute, could regulate it. There is no longer a jury of the

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vicinage. Parties and witnesses are most generally unknown to both courts and juries, especially in the higher courts. To a great extent this must be so, in large cities. When a stranger is offered as a witness on the stand, the judge and jury have a right to know what are his pursuits in life, his associations, and in many cases his opinions, so that they may the better judge what credibility he is entitled to. It is the duty of the court to see that such inquiries are not too much extended, and to check them when there is any tendency to abuse. Religious opinions, though necessarily of a delicate nature, are not without the pale of inquiry. It was said by that stern and able old judge, Chief Justice Spencer, in *Jackson v. Gridley*, (18 *John*. 106 :) "Religion is a subject on which every man has a right to think according to the dictates of his understanding. It is a solemn concern between his conscience and his God, with which no human tribunal has a right to meddle. But in the development of facts and the ascertainment of truth human tribunals have a right to interfere. They are bound to see that no man's rights are impaired or taken away, except through the medium of testimony entitled to belief. And no testimony is entitled to belief, unless delivered under the solemnity of an oath, which comes home to the conscience of the witness, and will create a tie arising from the belief that false swearing would expose him to punishment in the life to come. On this great principle rest all our institutions, and especially the distribution of justice between man and man."

I do not believe that it is improper or illegal to ask a witness, on his cross-examination, whether he believes in the existence of a Supreme Being who will punish false swearing. In this case the witness answered that he did not so believe. What to him, therefore, was the solemnity of an oath? The appeal to God was but a solemn mockery. But if all oaths were dispensed with in the administration of justice, all men would not be entitled to equal credit. Pursuits, habits, associ-

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ations and opinions would still be the subject of inquiry for the purpose of informing the judgments of courts and juries.

But as my brethren think that there was error in that part of the judge's charge which submitted the question whether the defendant purchased the property with intent to defraud the creditors of his brother, on the ground that there was not sufficient evidence of there being other creditors, there must be a new trial.

All the judges were of the opinion that the judge, who presided on the trial, committed no error in permitting the plaintiff to show, by Spencer, on his cross-examination, that he did not believe in the existence of a God who will punish false swearing; or in his charge to the jury as to Spencer's evidence. But a majority of the court were of the opinion a new trial should be granted for the reasons contained in the concluding portion of the opinion of Justice Balcom.

New trial granted, costs to abide the event.

[CORTLAND GENERAL TERM, November 9, 1858. *Gray, Mason, Balcom and Campbell*, Justices.]

 BEEBE vs. AYRES.

Where the regulations of a rail road company require the conductors upon each division of the road, on starting with each train, to examine the tickets of the passengers and tear off from a corner thereof the letter indicating that division, and if a passenger desires to stop over, at any point, the conductor is authorized so to indorse his ticket as to secure his passage from that point to the end of the division; but if the ticket is *not* so indorsed, other conductors on the same division are to disregard it and collect fare, or put the passenger off the cars; if a passenger, after entering upon a particular division and having the letter appropriate to that division torn off his ticket, stops over at a station without giving notice to the conductor, or asking him to make the proper indorsement upon his ticket, and, the next day, proceeds upon his journey, on another train, and presents the ticket, thus mutilated and without indorsement, to the conductor, the latter is not bound to receive the same; but will be justified in collecting the fare of the passenger, or in putting him off the cars, upon his refusing to pay.

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Such a regulation is a reasonable one, and is necessary, in order to guard against fraud.

If a passenger chooses to stop and lie over, it is not unreasonable to require him to procure his ticket to be so indorsed as to make it a voucher to the conductor having charge of a subsequent train.

Under such a regulation, the rule of evidence is prescribed to the conductor. What is written or printed upon the ticket is the only evidence he has any right to take. If the letter indicating the passenger's right to ride upon a particular division is torn from the ticket, it is evidence to the conductor that the holder has ridden over that division; and the latter has no right to supply what that letter indicated, by parol proof.

In such a case it is not necessary to prove that the passenger knew the object of divesting the ticket of its corners. He will be presumed to have purchased his ticket with reference to the regulations of the road.

Where a verdict is taken for the plaintiff, subject to the opinion of the court, if there are exceptions in the case, upon which either party has a right to be heard, on a motion for a new trial, the court cannot give judgment for the defendant, on the verdict, but the verdict will be set aside as for a mistrial.

THIS action was tried at the Broome circuit, in October, 1857, before BALCOM, J., and a jury, and upon the trial the following facts appeared, viz: That the New York and Erie Rail Road, upon which the plaintiff was a passenger and the defendant a conductor, consists of four divisions. The eastern, extending from Piermont to Port Jervis; the Delaware, extending from Port Jervis to Susquehanna; the Susquehanna, extending from Susquehanna to Hornellsville, and the western, extending from Hornellsville to Dunkirk. And that the tickets issued to passengers upon the road, have upon them, at each corner, a printed letter, which is the initial of one of the several divisions of the road; and that by the regulations of the rail road company, each conductor of a train passes over the whole of a single division of the road, and is required to go through the cars when first entering upon his division, and examine the ticket of each passenger and tear off from the corner of it the letter indicating the division over which he runs, and then return the ticket to the passenger; and if a passenger desires to lie over at any point on the division, the conductor is authorized so to indorse his

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ticket as to secure his passage from that point to the end of the division, if the ticket extends so far, and when so indorsed, other conductors on the same division are to receive it. If not indorsed, other conductors on the same division are to disregard it, and collect fare ; and if the passenger refuses to pay or to leave the car upon request, it is made the duty of the conductor to put him off. While these regulations were in force and on the 16th of September, 1856, the plaintiff purchased a passenger ticket from Newburgh, on a branch of the eastern division, to Addison, on the Susquehanna division, having upon it the printed words, "Good this trip only." He started on the trip on the evening of the day he purchased the ticket, and passed on as far as Deposit, on the Delaware division, and then lay over one train, and on the morning of the next day went on board of a slow train and stopped off again at Great Bend, on the Susquehanna division, where he remained until the afternoon of the 17th of September, when he got on board of a train of which the defendant was conductor. Upon leaving Susquehanna, (the commencement of that division,) on his way to Great Bend, a new conductor came on board and called for tickets. The plaintiff exhibited his ticket ; the conductor took it and tore off the corner having upon it the letter indicating the division over which they were then passing ; with the ticket in this condition the plaintiff got on board of the train conducted by the defendant, by whom he was asked for his ticket. He exhibited one having all the corners with the letters indicating the respective divisions over which he had passed, including the Susquehanna division, torn off. This ticket thus mutilated, the defendant refused to receive, and demanded of the plaintiff his fare, which the plaintiff refused to pay, insisting that he had paid his fare from Newburgh to Addison. The defendant told him he could not help that ; his instructions were such that he could not receive his ticket. The plaintiff said "do you suppose that I would lie?" To which the defendant replied, "I suppose what you say is true, but I cannot take the ticket,"

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and if he did not pay he should put him off; that he had better keep the ticket he had, and when he got to Binghamton buy another. When the train arrived at Binghamton the plaintiff refused to purchase another ticket and the defendant put him off the train. The defendant being examined as a witness in his own behalf, testified that he had no reason to believe the plaintiff had traveled on the ticket any further than to Great Bend. There was evidence tending to show that the conductor on the Delaware division allowed the plaintiff to pass from Deposit to Susquehanna, notwithstanding the corner of the ticket having upon it the letter indicating that division had been previously torn off by the conductor who had charge of the previous train from Port Jervis to Susquehanna, and that the conductor having charge of the train from Susquehanna to Hornellsville, upon which the plaintiff rode from Susquehanna to Great Bend, advised the plaintiff to lie over at Great Bend until a faster train should come along. But it did not appear that the conductor knew he got off at that place, or that the plaintiff asked the conductor so to indorse his ticket that it would be good for the next train.

Dickinson & Wright, for the plaintiff.

Geo. Sidney Camp and J. J. Taylor, for the defendant.

GRAY, J. It does not appear from the case that a point was made upon the trial, founded upon the conduct of the two conductors—of the one, in permitting the plaintiff to ride upon a mutilated ticket from Deposit to Susquehanna, in violation of the rules of the company, or of the other in advising the plaintiff to lie over at Great Bend. And if one had been made, I am unable to perceive how the conduct of one conductor, in violating the rules of his employers, could prejudice another more faithful than himself, who adhered to his instructions and discharged his duties under them. Nor can I per-

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ceive that any wrong was committed by the conductor who advised the plaintiff to lie over at Great Bend. The plaintiff was not advised to omit getting his ticket indorsed, and if he had been, it would have been the error of that conductor and not the error of the defendant. It must be borne in mind that this action is not against the company, for any wrongful act of its employee, or against any employee whose acts have misled the plaintiff, but against one who has committed no wrong, provided the regulations of the company were reasonable and were reasonably executed. Nor can it prejudice the defendant that he believed the plaintiff's statement to be true. The company, by their regulations, had prescribed rules of evidence for him. He had no right to act upon oral evidence; what was written or printed upon the passenger's ticket was the only evidence he had the right to take; and when the letter indicating the plaintiff's right to ride upon the Susquehanna division was torn from the ticket, it was evidence to him that the plaintiff had ridden over that division, and the plaintiff had no right to supply what that letter indicated, by parol proof. Once admit the right of the conductor to take the word of a passenger as a substitute for a ticket or what a ticket indicates, and frauds innumerable would be committed by dishonest travelers, upon over credulous conductors. All concede that the important interests which rail road companies have at stake, render regulations to be observed, not only by their conductors, but by passengers on their trains, indispensable to secure each against imposition by the other. The right of the company to make such rules stands upon authority not to be questioned here. (*Hibbard v. The New York and Erie Rail Road Company*, 1. E. P. Smith, 455.) The regulations of the road, however, must be reasonable or its patrons are not bound by them. A part of the contract between the plaintiff and the rail road company was that the ticket given him should be good only for the trip he commenced on the day he purchased the ticket; and for the purpose of ascertaining how much of the trip he made, each

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conductor, by the regulations of the company, was required, at the commencement of his division, to call for and examine, then, the tickets of the passengers, and tear off from each ticket the corner having upon it the letter indicative of his division. This was a necessary regulation to guard against fraud; if the letter should not be torn off until after leaving the station nearest the end of the division, the plaintiff might have traveled to within a few miles of Hornellsville and stepped off with his ticket in his pocket, and passed it over to another, or retained it himself and rode again with some other conductor, from Susquehanna to the same station where he got off, as often as he pleased, unless he should be recognized by some conductor who could detect him in the fraud; or the ticket might be passed from one to another and answer the purposes of a hundred passengers from the beginning of the Susquehanna division to the station next to its end. The plaintiff professes not to have understood why the corners of the ticket were torn off. His want of intelligence in that respect cannot aid him; he had ridden over the road often, and of course must have seen printed upon the corners of his ticket the letters indicating the respective divisions of the road, and when he had seen a conductor of each division he passed, tear off the corner of his ticket, having upon it the letter indicating the division over which he was traveling, he had the means of knowing that his ticket, which by its terms was good only for the trip he was then taking, was being divested of its corners that the ticket itself might show how much of the trip he had traveled. But it is not necessary to prove that he knew the object of divesting the ticket of its corners. He is presumed to have purchased the ticket in reference to the regulations of the road. (*Northern Rail Road Company v. Page*, 22 Barb. 130.) And when he chose to lie over a train, there was nothing unreasonable in requiring him to procure his ticket to be so indorsed as to make it a voucher to the conductor who should have the charge of the next or some subsequent train. No point is made that the regulations of

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the company were unreasonably executed by the defendant, by the exercise of too great force in ejecting the plaintiff from the car. The verdict upon the whole case was taken, subject to the opinion of this court, and I am of opinion, for the reason stated, that the defendant should have judgment upon the verdict.

BALCOM, J. The plaintiff purchased a ticket at Newburgh which entitled him to a ride from that place, in a passenger car on the New York and Erie Rail Road, to Addison. The words "good this trip only," were on it, and it was dated "Sept. 16, 1856." The letters E. D. S. W. were on the corners thereof. Those letters, according to the rules of the rail road company, were to be torn off by the conductors of the train, on which the plaintiff should ride, in this manner, to wit: the conductor on the eastern division of the road was to tear off the letter E; the one on the Delaware division was to tear off the letter D; and the one on the Susquehanna division was to tear off the letter S.

The plaintiff by virtue of the ticket, rode in the afternoon and night of the 16th day of September, 1856, upon the rail road as far west as Deposit, on the Delaware division; but before he arrived there the conductors of the train on which he rode had torn the letters E. and D. off the ticket. He stopped at Deposit and staid there till the next day, as he claimed at the trial, because the conductor on the eastern division of the road had told him he could stop there and it would be all right. But he did not have the conductor on the Delaware division indorse any thing upon the ticket to show his right to stop at Deposit, as he should have done, according to the rules of the rail road company. In the forenoon of the 17th day of September, 1856, the plaintiff rode on an emigrant train by virtue of the ticket, without objection from the conductor thereof to Susquehanna, where another conductor took that train. He then rode from that place on the same train, by virtue of the ticket, to Great Bend; but

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before he arrived there the conductor who took that train at Susquehanna, tore the letter S. off the ticket, and handed it back to the plaintiff. The express train which the defendant ran as conductor, was then behind the emigrant train, but it was a much faster one than the latter, and was to pass the latter before arriving at Addison. The plaintiff left the emigrant train at Great Bend and waited there until the express train came up and then got upon that. He did this, as he testified upon the trial, because the conductor of the emigrant train told him, if he was in a hurry he had better do so: but he did not tell such conductor that he should leave his train there, and take the express train; neither did he have such conductor make an indorsement upon the ticket, to show the conductor of the express train that he had not ridden on the Susquehanna division of the road to Addison by virtue of the ticket. After the express train left Great Bend, and before it arrived at Binghamton, the defendant, as conductor thereof, demanded fare of the plaintiff, who presented the above mentioned ticket to him, the letter S. being torn off. The defendant refused to accept the ticket, and informed the plaintiff that unless he paid the usual fare to him, he should put him off the train. The plaintiff refused to pay fare to the defendant, on the ground that he had not before traveled on the road by virtue of his ticket west of Great Bend. After the train was stopped at Binghamton the plaintiff refused to leave the cars or pay fare to the defendant; and the defendant then forcibly ejected him from the cars and left him at that place.

The plaintiff brought this action to recover damages for being thus forcibly ejected from the express train of cars by the defendant, at Binghamton. The jury assessed the plaintiff's damages (on the assumption that he could maintain the action,) at \$250; and by the direction of the judge who presided upon the trial, the jury found a verdict in favor of the plaintiff for \$250 damages, subject to the opinion of the court at the general term.

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Is the plaintiff entitled to judgment upon the verdict? In the first place the plaintiff did not inform the conductor of the emigrant train that he should leave that train and take the express train at Great Bend; and it is reasonable to suppose, if he had so informed him, such conductor would have told him he must have his ticket indorsed, to enable him to show the conductor of the express train that he had not ridden by virtue of it, west of Great Bend.

The plaintiff knew, when he went aboard of the express train, his ticket did not show that he was entitled to ride on that train; and he had no right to presume that the conductor of the emigrant train had authority to permit him to change trains without indorsing a statement to that effect upon his ticket. The plaintiff was on the express train, without any evidence of his right to ride there; certainly without such evidence as the defendant, as conductor thereof, was instructed, by the rail road company, to require of him. And granting that he was there by reason of what the conductor of the emigrant train said to him, that did not excuse him from furnishing evidence to the defendant of his right to ride on the express train, when he refused to pay fare; for what the conductor of the emigrant train said to the plaintiff was *unauthorized by the rail road company*, and therefore was not binding upon the defendant. The plaintiff had notice of this, before he was put out of the cars by the defendant; and he was not put out until after he had refused to leave the cars or pay fare to the defendant. The defendant obeyed the rules and regulations of the rail road company in ejecting the plaintiff from the cars; and I think he was justified in all he did towards the plaintiff at the time. (*See 1 Smith, 455.*)

But we cannot give judgment for the defendant on the verdict, for the reason that there are exceptions in the case, upon which either party has the right to be heard on a motion for a new trial. The verdict must therefore be set

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aside as for a mistrial, costs to abide the event. (*See 2 Smith, 602, 606.*)

All the justices concurred in both of the above conclusions.

Verdict set aside as for a mistrial, costs to abide the event.

[CORTLAND GENERAL TERM, November 9, 1858. *Gray, Mason, Balcom and Campbell, Justices.*]

THE PEOPLE *vs.* THE NEW YORK CENTRAL RAIL ROAD
COMPANY.

In the computation of time under a statute, the day from which a specified number of days is to be counted, is to be excluded, and the day on which the period expires is to be included.

Thus where a statute declared that certain penalties, incurred by rail road companies, should be sued for *within ten days* after the same were incurred, *Held* that an action for penalties incurred on the 20th of December, was properly brought on the 30th of that month.

APPEAL from a judgment entered at a special term, after a trial at the circuit. The action was brought to recover penalties or fines, to be imposed upon the defendants, for neglecting to ring a bell, or sound a steam whistle on crossing a highway with their locomotives, as required by statute. By the general rail road law, (*Laws of 1850, ch. 140, p. 211, § 39,*) a bell is required to be rung, or whistle sounded, by every rail road company, on crossing a public highway with a locomotive, under a penalty of \$25 for every neglect, to be sued for by the district attorney of the county *within ten days after* such penalty is incurred. By chapter 282, Laws of 1854, page 608, a bell shall be rung, &c. and every neglect shall subject the corporation to a fine not exceeding \$20. All the penalties may be sued for in the name of the people of the state of New York, by the district attorney of the county,

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within ten days thereafter. The plaintiff proved eight different neglects of this kind by the defendants, in the town of Sennett, Cayuga county, on the 20th of December, 1856. The action was commenced on the 30th of December. The defendants moved for a nonsuit, on the ground that the action was not brought in time; which motion was denied. The judge charged the jury that if the action was commenced on the 30th day of December, it was in time to recover the penalties incurred on the 20th of that month, and within the ten days prescribed by the statute. The jury, by their verdict, found that the defendants had been guilty of eight different neglects, on the 20th of December; and the court, in pursuance of such verdict, imposed a fine of \$60 upon the defendants; for which sum, with costs, judgment was entered.

S. Giles, for the plaintiff.

J. C. Cox, for the defendants.

By the Court, E. DARWIN SMITH, J. Under the charge of the court, that if the action was commenced on the 30th of December the plaintiff could recover for the penalties incurred on the 20th of December, the jury have found the defendants guilty of eight different neglects or offenses on that day. By this construction and finding the liability of the defendants in the action extended through eleven days; the offense being committed on the 20th, and the action commenced on the 30th, or for ten days after the 20th, exclusive of the 20th. The question is, under the statute, for how many days after the commission of the offense did the defendants remain liable to be sued for such offense; or when did the statute of limitations apply to the offense and terminate the defendant's liability to an action therefor. The statute (*Laws of 1854, chap. 282, § 7, p. 611,*) after declaring it to be the duty of all rail road companies to ring a bell or sound a steam whistle for at least eighty rods from the place where the rail road shall cross

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any traveled road, and declaring that every neglect to comply with the provisions shall subject the corporation owning the rail road to a fine not exceeding \$20, provides as follows: "All the penalties hereinbefore mentioned may be sued for in the name of the people of the state of New York, by the district attorney of the county where the same shall occur, *within ten days thereafter*." If the ten days are to be computed from the act done—the offense committed—the 20th of December should be included within the ten days, and the ten days would expire on the 29th. The people obviously could have commenced this action on the 20th of December, as soon as the offense was committed; and if the legislature intended to allow the people only ten days within which to prosecute, then ten days had elapsed before this suit was commenced, and the case, in this view of it, would fall within the cases of *Arnold v. United States*, (9 Cranch, 120;) *Pierpont v. Graham*, (4 Wash. 232;) *Presley v. Williams*, (15 Mass. R. 193;) and *Rex v. Adderley*, (Doug. 446.)

But I think we are hardly at liberty to adopt the rule of construction of these cases; that is, including the day on which the act is done, as within the ten days allowed by the statute, since the case of *Ex parte Dean*, (2 Cowen, 605,) and *Snyder v. Warren*, (*Id.* 518.) In the case of *Ex parte Dean* the court said, "We have departed from the rule of construction adopted by the English courts, and hold that the same mode of computation is to be adopted upon statutes, which prevails both in England and in this state as to notices; that is to say, "one day is counted inclusive and the other exclusive." The code (§ 407) declares the same rule. This applies to all questions of practice. The same rule applies in the construction of contracts. The same rule for the construction of statutes is re-asserted in *Commercial Bank v. Ives*, (2 Hill, 356;) *Wilcox v. Wood*, (9 Wend. 348;) *Columbia Turnpike v. Haywood*, (10 *id.* 422;) *Homan v. Liswell*, (6 Cowen, 660.) And see *Smith's Commentaries*, § 618 and note.

As the mode of computing time is of less real consequence

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than that there be some uniform rule on the subject, I think it was the obvious purpose of those who have come before us in this court, whose decisions are above referred to, to adopt and adhere to the same rule in the construction of statutes which obtained in respect to contracts, notices and proceedings in the practice of the courts. And I think also that we are bound to presume that the legislature have acted in reference to this rule in the passing of statutes and in the language used therein. The rule is at best arbitrary, and it is not for the public interest that it be uncertain and fluctuating. It is far better for the courts to adhere to one uniform rule. The rule fixed by the legislature, in the code, for its construction, I think should be followed in the construction of *all statutes*. The decision at the circuit, I think, was right. The objection that the plaintiff is not entitled to costs I think untenable. This is a civil action for the recovery of money, and the plaintiff recovering more than \$50 by the judgment of the court, is entitled to costs under the statute.

The judgment of the special term should be affirmed.

[MONROE GENERAL TERM, September 6, 1858. *Welles, Johnson and Smith, Justices.*]

SAGE and others vs. D. MOSHER and J. G. MOSHER.

A complaint, in the nature of a creditor's bill, alleged the recovery of five judgments by the plaintiffs against D. M. and the issuing of executions and the return thereof unsatisfied. That previous to the recovery of the judgments, D. M. was the owner of certain real estate, which he conveyed to J. G. M. without any consideration, and with intent to defraud creditors; and that D. M. had other equitable interests which ought to be applied on said judgments. The complaint prayed that the sale and conveyance of the land might be set aside, and for equitable relief, &c. No equitable property was discovered; and it appeared in proof that the real estate had been conveyed to one G. before the commencement of the suit. G. was not made a party to the suit. *Held* that the referee should have dismissed the complaint, or

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suspended the trial until the plaintiffs, by amendment or supplemental bill, had made G. a party.

Held also, that the action as a creditor's bill, having at the time of the trial, entirely failed of its object, it could not be converted into a legal action for the purpose of recovering a judgment for damages, against the defendants, or either of them.

Although in equity several judgment creditors may join in one suit to reach the equitable property of their common judgment debtor, or remove a fraudulent incumbrance in the way of the collection of their judgments, they cannot thus unite in an action at law.

They are not entitled to a common joint judgment at law; and an equity suit cannot thus be turned into a suit at law for the recovery of damages.

APPEAL from a judgment entered at a special term, on the report of a referee. The facts sufficiently appear in the opinion.

C. G. Judd, for the appellants.

E. A. Hopkins, for the respondents.

By the Court, E. DARWIN SMITH, J. The complaint in this action is in form a creditor's bill. It sets out five different judgments, rendered on or about the 4th of December, 1855, and states that executions were duly issued on such judgments and returned unsatisfied. It states that the defendant Davison Mosher, on the 13th of January, 1855, was the owner of certain real estate in Seneca county, which he, on that day, conveyed to the defendant John G. Mosher, without any bona fide consideration, and to hinder, delay and defraud his creditors. The complaint also states that the defendant Davison Mosher has other equitable interests, which ought to be applied on said judgments, and prays that the sale and conveyance of said land may be set aside, and for equitable relief, or that the defendants may be adjudged to pay the plaintiff's judgment with costs. No equitable property has been discovered and attached by the proceeding, and the referee finds that the title to the real estate had been conveyed to a person not a party to the action. Such real estate appears to have been conveyed by John G. Mosher to one Greg-

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ory, before the commencement of the suit, and Gregory not being a party to the suit, there could obviously be no judgment or decree in this suit affecting the land, or the title of said Gregory thereto. Upon these facts appearing, I think the referee should have dismissed the complaint, or suspended the trial until the plaintiffs, by amendment or supplemental bill, had made Gregory a party. Upon the allegations of the complaint, the plaintiffs were clearly entitled to follow the property into the hands of Gregory, and if they could impeach his title thereto, were entitled to have the conveyance to him set aside and the property sold under the decree of this court and the proceeds applied in payment of their judgments; or else to be at liberty to sell the land on their executions at law. But as a creditor's bill, at the time of the trial, it had entirely failed of its object. It had attached or bound by the lien thereof, no property, and could not then, I think, be converted into a legal action for the purpose of recovering a judgment for damages against the defendants, or either of them. Here were five parties, with five separate judgments, at law. In equity different judgment creditors were entitled in one bill to reach the equitable property of their common judgment debtors, or remove a fraudulent incumbrance in the way of the collection of their judgments, but they cannot thus unite in an action at law. They are not entitled to a common joint judgment at law. An equity suit cannot thus be turned into a suit at law for the recovery of damages. Except as an action in equity, the plaintiffs' complaint does not state facts entitling the plaintiffs to any common judgment or relief, and it would have been demurrable at law for multifariousness. Five actions of tort, by five different plaintiffs, might just as lawfully and appropriately be joined as five actions for *fraud*, on five separate judgments, by five several parties, when the recovery is sought in damages. The referee ordered a judgment for \$2170, which is apportioned, in the order for judgment, among the several plaintiffs according to the amounts due them on their respective judgments. But the judgment

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is entered up and docketed as one entire judgment. I know of no authority for such a recovery or such a proceeding, and think the judgment should be reversed.

Judgment reversed and new trial granted. Costs to abide the event.

[MONROE GENERAL TERM, September 6, 1858. *Welles, Smith and Johnson*, Justices.]

TINNEY *vs.* STEBBINS.

Although no action at law will lie, at the suit of one tenant in common, against another, in respect to the common property, without proving a loss, destruction or sale of the property by the defendant; and although no action at law can be maintained by one tenant in common, for the *partition* of such property, yet a court of equity is competent to give relief in such cases, by decreeing a partition of the property, or a sale thereof where partition is impracticable, and a division of the proceeds.

APPEAL, by the plaintiff, from a judgment of nonsuit. In April, 1855, the plaintiff took of the defendant five or six acres of his mint ground, to work on shares, the plaintiff to put in the crop and do the work, and the defendant to furnish a team and half the roots, and a distillery, and each to have half of what was raised, to be divided in the oil. The parties went on under the contract, each doing his part, and raised a crop which when distilled, amounted to 112 pounds. It was filtered on the defendant's premises, according to the contract, and when filtered was there in his possession. Thereupon in October, 1855, the plaintiff went with his servant to the defendant's house, taking cans with him, to get his half of the oil. He told the defendant what he had come for, but the defendant said "he should not give up the plaintiff's oil, unless the plaintiff would secure him (the defendant,) on a note the defendant held against the plaintiff." This the plain-

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tiff declined to do, reminding the defendant that the note was not even due, and repeating his demand for the oil, which the defendant again refused to give up, and said he should keep it as security for the note. The prayer of the complaint was for judgment, that the interests of the plaintiff and of the defendant, in the oil, might be ascertained, determined and declared, and that the defendant might be adjudged to deliver the said oil, or so much thereof as the plaintiff's portion might be, to the plaintiff, or in lieu thereof to pay him therefor at and after the rate of four dollars per pound for each and every pound thereof, with costs; and for such other or such further relief and judgment as the court should deem just in the premises. Oil was shown to be worth at the time of the demand, in the market in Arcadia, where the parties resided, \$3.25 to \$3.50 per pound. The contract having been silent about the *time* when the division of the oil should be made, the plaintiff made out this part of the case by an offer of proof that by the custom of growers in that vicinity, the usual time of dividing was in the fall of the year, immediately after distilling. This was excluded at the trial. At the close of the proofs the plaintiff was nonsuited on motion of the defendant, on the ground "*That no action for a partition of personal property will lie between tenants in common thereof*, and that the complaint does not state or proof show a cause of action." To this ruling the plaintiff excepted.

G. H. Arnold, for the appellant.

James C. Smith, for the defendant.

By the Court, E. DARWIN SMITH, J. The plaintiff and defendant were tenants in common of the 112 pounds of oil in controversy, and the same was in the defendant's possession at the time of the commencement of this suit, and he had refused to let the plaintiff have his half thereof. No action at law will lie, at the suit of one tenant in common,

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in respect to the common property, without proving a *loss, destruction or sale*, of the article by the co-tenant. (*Gilbert v. Dickenson*, 7 *Wend.* 450. 2 *John.* 468. 3 *Id.* 175.) Nor can any action at law be maintained by one joint tenant or tenant in common, for the partition of personal property. But the law is not subject to the reproach that there is no remedy for the joint tenant or tenant in common deprived of his just rights, to the possession, use or fruits of the common property. A court of equity is competent to give relief in such cases, by decreeing a partition of the property, or a sale thereof where partition is impracticable, and a division of the proceeds. The powers of a court of equity were conferred and exist, to meet just such cases, where no adequate remedy exists at common law. (*Smith v. Smith*, 4 *Rand.* 95. *Kelsey v. Clay*, 4 *Bibb*, 441. 15 *Barb.* 336.) This case was treated at the circuit as a common law action, and was rightly disposed of upon that ground; but the plaintiff's case was one for equitable relief, and his prayer was adapted to such relief, and he was clearly, upon the proofs, entitled to a decree *in rem* in respect to the oil. There should, therefore, be a new trial, with costs to abide the event.

New trial granted.

[MONROE GENERAL TERM, September 6, 1858. *Welles, Johnson and Smith* Justices.]

BIRCHELL *vs.* STRAUSS and others.

Where a person, who is actually insolvent, purchases goods on credit, upon the strength of his own representations that he is solvent and responsible, yet he is not liable to arrest, in an action brought to recover the value of the goods, if, at the time he made the representations, he believed them to be true.

In all cases in which fraud is charged, proof of an actual intent ought to be required, to justify or sustain an order of arrest. The constructive guilt of a debtor, who is innocent in fact, should not be held a sufficient ground for his imprisonment.

Although there be circumstances attending and following the execution of an assignment of his property, by a debtor, which may be evidence of constructive fraud, sufficient to set aside the assignment, yet they will not be deemed evidence, *per se*, of an actual fraudulent intent on the part of the debtor, furnishing sufficient ground for his imprisonment.

An assignment of *all* the debtor's property, stated to be "more particularly enumerated and described in a schedule thereof" thereto annexed, marked A. is not void by reason of the omission to annex the schedule. Nor is such omission evidence of even a constructive fraud.

APPEAL by the defendants from an order made at a special term, denying a motion to vacate an order of arrest. The material facts appear in the opinion of the court.

E. & E. F. Brown and Waldo Hutchins, for the appellants.

J. J. Townsend, for the respondent.

By the Court, DAVIES, P. J. The defendants were arrested upon an order made by Justice Sutherland, dated July 2, 1858. The order was granted upon two affidavits, one made by the plaintiff and the other by his attorney. The affidavit of the plaintiff states that in July, 1857, he sold goods to the defendants, upon the faith of representations made by Abraham Emanuel, one of the defendants, to the effect that the firm of the defendants were responsible and engaged in a flourishing and profitable business, and he swears that he sold the goods to the defendants "solely upon the faith of said representations." He then proceeds to detail the subsequent acts and proceed-

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ings of the defendants ; that they failed on the 12th of September, 1857, and had made an assignment ; that after such purchase they had sold goods to two brothers of the defendant Emanuel, which had not been paid for in full, and had done other acts, and from all which he states, and “therefore alleges, and his allegations are founded on the circumstances before detailed, that at the time of purchasing said goods, the defendants were insolvent and unable to pay their indebtedness in full, and that they then knew of such insolvency ; and that such representations were false and untrue and then known to be so by said defendants.” The plaintiff therefore alleges, and his allegations are founded on the circumstances aforesaid, “that the defendants, at the time of incurring the above indebtedness, were not engaged in a flourishing or profitable business, and that they were guilty of a fraud in contracting the debt for which this action is brought.” The affidavit of the plaintiff’s attorney contains no new fact, beyond annexing thereto a copy of the assignment made by the defendants, and the statement that at the time of its execution no schedule of the property assigned was annexed thereto, and that none was annexed until some three weeks thereafter.

The defendants, by their affidavits, deny in the most positive terms, any representation made to the plaintiff of the character stated by him, and they swear that the goods were purchased by *Joseph* and not by *Abraham Emanuel*, as stated by the plaintiff, at Germantown in Pennsylvania. That *Abraham Emanuel* was not present when the purchase was made, but was in the city of New York ; and *Joseph* swears that he purchased the goods not of the plaintiff but of his clerk, and that the plaintiff was not present at the time. That the defendants had purchased goods of the plaintiff since August 8, 1856, and had paid for all of such purchases except the last, and that this purchase was made in the same manner as the other, and that he made no representation whatever to induce such sale, or any representation of the kind stated by the plaintiff.

Isaac Emanuel, not one of the defendants, states that he

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was present at Germantown when Joseph Emanuel purchased the goods. That neither the plaintiff nor Abraham Emanuel were present. That no questions were asked Joseph of the character stated by the plaintiff; and that he made no representation of the kind stated by the plaintiff, or any representations as to the solvency of the defendants. That the goods were then sold to Joseph by a clerk of the plaintiffs.

We think, therefore, from this testimony, we are bound to assume that the plaintiff is mistaken in stating that he sold the goods to Abraham Emanuel, and that at the time of such purchase Abraham Emanuel, or either of the other defendants, made to the plaintiff the representation stated in his affidavit, or any representations whatever; and that he is consequently mistaken in stating that he sold said goods "solely upon the faith of said representations." Upon the assumption that the representations, as stated by the plaintiff, had been made, and the goods sold on the faith of them, the facts stated by the plaintiff, showing their falsity, are very feeble. The correct rule on this subject is well laid down by BALCOM, justice, in *Gaffney v. Burton*, (12 How. 516.) He says, in that case, the affidavit upon which the defendant was arrested does not show "that the defendant knew that the representations were false, which he made, as to his ability to pay, before or at the time he purchased the goods of the plaintiff. If he believed his representations were true at the time he made them, he was not guilty of any fraud, however false they may have been." In the present case no fact is stated, tending to show that if the representation had been made the defendants had reason to believe the same was not then true. The fact of the purchase on the 10th of July, 1857, and the subsequent failure on the 12th of September in that year, is far from being conclusive proof of a fraudulent intent, when connected with the history of that period, and the great changes which took place in those two months in the financial condition of the most solvent institutions and firms in this city and throughout the country. And the defendants state that during this

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period they paid to their creditors over the sum of \$64,000, and purchased goods in the usual course of their business, on credit, to the amount of only about \$30,000. And during the same period they sustained losses by the failure of other firms, in the aggregate, to over the sum of \$40,000. I find it impossible upon these facts, assuming the representations to have been made, to believe that the defendants knew them to be false at the time. On the contrary it seems to me they had every reason to suppose they were, on the 10th of July, 1857, solvent.

But it was earnestly urged on the argument, that the order of arrest should be retained, on the ground that the defendants had been guilty of fraud in making the assignment; or, in other words, that the assignment being fraudulent and void, the defendants were guilty of fraud, and should not be discharged.

It seems to me that the language of the late Chief Justice Duer, concurred in by his associates, in *Spies v. Joel*, (1 *Duer*, 669,) is quite pertinent on this point. He says: "It may be true, as the counsel for the plaintiffs has contended, that the court of appeals, by its recent decision, has settled the law, that the omission in an assignment giving preferences, of any provision relative to a possible surplus, is evidence of a fraudulent intent, which renders the assignment void under the statute. But in my judgment it is only a *constructive* fraud which is thus established, for I cannot regard the omission as evidence, *per se*, of an actual intent existing in the mind of the debtor and governing his act, and I am clear in the opinion that it is proof of an actual intent that in all cases in which fraud is charged, ought to be required to justify or sustain an order of arrest. The constructive guilt of a debtor, who is innocent in fact, can never be held by me to be a sufficient ground for his imprisonment." In these views I entirely concur; and applying them to the present case, they dispose of the grounds upon which we are asked to retain this order of arrest. They are, 1st. That the conveying clause referred

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to a schedule for the description of the assigned assets, which was not in existence and never attached. 2d. No change of possession of the assigned estate. 3d. That an immediate delivery of the assigned property did not take place. 4th. That some of the preferred debts do not appear in the defendant's books. 5th. The assignees' refusal to give information as to the condition of the assets.

These positions, if established, may be evidence of constructive fraud, sufficient to set aside the assignment, but we fail to see that they are evidence per se of an actual fraudulent intent on the part of the defendants, furnishing sufficient ground for their imprisonment. The first objection was mainly relied on upon the argument, and it was insisted that the omission to annex the schedule was conclusive evidence of the intent to defraud. The case of *Moir v. Brown*, (14 Barb. 39,) was relied on as establishing this position. In that case the assignors granted to their assignees "All and singular the lands, &c., &c., more particularly enumerated and described in the schedule hereto annexed, marked A; to have and to hold, &c." The court held in that case that the schedule was made part of the conveyance and was referred to as containing a specification of property conveyed, and was intended to be annexed. That in such a case it must be annexed, not only as a description and specification of the property, but it is necessary by the very terms of the instrument to complete the conveyance or transfer, and that in that case the assignment was insensible, and as against creditors, did not convey the property to the assignees.

In the present case the language used in the recitals of the assignment, is "Whereas the said parties of the first part are indebted, &c., and are desirous to make arrangements for the payment thereof by an assignment of *all their property and effects* for that purpose," and then they grant, &c. "All and singular the goods, chattels, stocks, promissory notes, debts, things in action, claims, demands, property and effects, belonging to the said parties of the first part or either of them,

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(except such property as may be by law exempt from sale on execution,) the same being more particularly enumerated and described in a schedule thereof hereto annexed, marked schedule A." The assignment also authorizes the assignees "to ask, demand, recover and receive of and from all and every person and persons, *all* the property, debts and demands belonging and owing to the said parties of the first part."

The language used in this assignment is identical with that employed in the case of *Platt v. Lott*,^(a) decided in the court of appeals, June, 1858, and to which we have been referred. Selden, justice, in giving the opinion of the court in that case, says: "If, in looking at the assignment in this case, we are able clearly to see that it was the intent of the assignors to convey to the assignees the whole of their property, we are bound to give effect to that intent. Were this question to depend solely upon the main clause in the instrument, I should have very little doubt as to the design with which it must have been executed. Not only the general terms in which that clause is couched, embracing as they do all the property of the assignors, both real and personal, but the emphatic language with which, as we have seen, it concludes, viz: "of every description, belonging to the said parties of the first part, or in which they have any interest whatever," would seem to manifest a plain intent to convey every thing which the assignors possessed. It is true this clause is followed by the words, "the same being more fully and particularly enumerated and described in a schedule," &c. This, however, by no means indicates an intention to qualify or limit the broad and comprehensive language previously used. A schedule would, of course, be necessary as a matter of convenience, and as a guide to the assignee; and the provision for its annexation, although it is thereby made a part of the assignment, does not warrant the inference that it was intended that if any portion of the property of the assignors should be omitted, which might well occur through accident

(a) 3 E. P. Smith, 478.

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or inadvertence, the title to such property should not pass to the assignee." He says, also, that this construction is strengthened by the fact that the assignment expressly recites that the assignors were desirous of providing for the payment of their debts, "by an assignment of *all their property* and effects for that purpose."

We must, therefore, hold that this case is an authority in point, for the position that the assignment now under consideration is not void by reason of the omission to annex the schedule mentioned therein, and that such omission is not evidence of even a constructive fraud, in this case.

It certainly cannot be regarded as evidence of a fraudulent intent, warranting us to hold the defendants under an order of arrest.

The order appealed from must therefore be reversed, with costs, and the order of arrest be vacated.

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A guardian *ad litem* for an infant over fourteen years of age should be appointed on the application of the infant, by petition; and the court must be satisfied that the infant has made a voluntary nomination. No person can be appointed guardian, on his or her own application, and without the infant's consent.

Where an action is brought against a married infant, by her husband, to dissolve the marriage contract on the ground of impotence, the mother of the defendant has no interest in the matter which will allow her to intervene and become a party to the litigation; especially after a guardian *ad litem* has been appointed for the infant, and the suit has proceeded to a decree, by which the marriage has been dissolved.

The mother therefore has no right to appeal from any decision made in the cause, so as to bring the merits thereof before the court for examination.

Although the court may hear her communications as *amicus curiæ*, that will give

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no warrant for her, in that capacity, to appeal from the decision made upon her application.

In all actions brought to obtain a dissolution of the marriage contract, it is the duty of the court scrupulously to guard the proceeding from being used by the parties collusively, and not to suffer a judgment therefor without being fully satisfied that the cause specified in the statute really exists.

Whenever facts are placed before the court which create suspicion that there is collusion between the parties—especially when the defendant is a female under the age of twenty-one years—it is the duty of the court at once to institute such an examination as will satisfy them that no collusion exists.

And if necessary, the court will order a reference, for that purpose.

It seems, that the mother, after the death of the father, has no right to the services of a minor child, and is not liable for its support.

THIS was an appeal from an order made at a special term, denying a petition presented by the mother of the defendant, as her natural guardian, (the defendant being an infant under the age of twenty-one,) praying that the decree obtained in this action, dissolving the marriage contract between the plaintiff and defendant, on the ground of the defendant's impotence, might be opened and the petitioner permitted to defend the action.

INGRAHAM, J. The parties to this action were married in October, 1857. The wife, at the time, was an infant of about 19 years of age. In November of the same year proceedings were commenced for a dissolution of the marriage contract upon the ground of impotence. A guardian was appointed for the infant defendant, who put in an answer, consented to a reference on two days' notice, to a hearing on ten days' notice before a referee; to a hearing before the court on four days' notice; and without any opposition permitted a decree to be taken against the defendant by default.

During these proceedings, the mother was not informed of them until the last of December, by a letter from the defendant. She immediately came to see her daughter and remained with her in New York for about a month. During that time she exerted her influence with the daughter, to induce her to resist the dissolution of the marriage contract. And for that

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purpose the opinions of Drs. Mott and Simms were taken as to the alleged impotence; both of whom, by their affidavits, state that they had made personal examinations, and found the generative organs in a healthful state, and that they had no hesitation in pronouncing the defendant perfectly and wholly competent for the married state. On a subsequent occasion, by further affidavits these physicians reaffirmed their former statements as to the condition of the defendant on the 22d January, 1858. Their opinions are sustained by that of Dr. Griscom and Dr. Alden.

Shortly after this time the defendant was removed from her residence to some other habitation in New York, where her expenses were defrayed by the plaintiff, and her present place of residence has been concealed from the mother, all access to her prohibited, and since that time the daughter has refused to see her mother, or to return to her former home, but has avowed to her mother, by letters, her determination to part from her entirely.

The mother thereupon applied to this court by petition, in February, 1858, stating the above and other matters and claiming, as the natural guardian of the daughter, to be allowed to intervene, and asking to have the decree opened, to be appointed guardian ad litem for her daughter, and for leave to defend the action. She also charges other matters against the husband and guardian which it is unnecessary here to repeat.

In answer to this petition the plaintiff and defendant have both united to sustain the decree. They have, by affidavits, denied many of the allegations of the petitioner, and have furnished testimony of physicians, giving a contrary account of the daughter's health and condition, and fully affirming that such incompetency exists and that the defendant is totally unfitted for the marriage state.

An objection is taken to the right of the mother to intervene in this action, or in any manner to interfere with the proceedings. This view as to the petitioner's rights was

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adopted by the justice, at special term. If that opinion is correct, then the petitioner not only had no right to interfere in the cause, but her appeal also is not well taken, because she has no standing in court, either as a party or as having any interest in the subject matter of the controversy, by which she can be made a party.

That the petitioner has no claim to be appointed guardian *ad litem* for the defendant is clear; even if the litigation between the parties was not closed.

The code (§ 116) prescribes the mode in which the guardian *ad litem* for a person over 14 years of age shall be appointed. This is to be on the application of the infant. No guardian would be appointed against such consent, and by the 63d rule it is provided that such appointment must be made on a petition of the infant proposing the guardian; and by the 64th rule the court is to be satisfied that the infant has made a voluntary nomination of such guardian. It would therefore be out of the power of the petitioner to be appointed such guardian without the infant's consent.

Has the mother then any other right to intervene in this action, as the protector of her daughter, or as entitled to her services during her minority, and being liable for her support and therefore as having an interest in the litigation?

The statute providing for a dissolution of the marriage contract, (2 *R. S.* p. 325,) after providing for various cases in which relatives or guardians or next friends might be parties, in section 38, provides that for physical incapacity of one of the parties, the action shall only be maintained by the injured party against the party whose incapacity is alleged; thus excluding from the action, as parties, any but the husband and wife.

Although the mother might have intervened under the rule in the ecclesiastical courts in England, I do not understand that the rule has been adopted in this country. The cases relied upon as showing that the chancellor adopted the same rule here do not sustain that position.

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In *Devanbagh v. Devanbagh*, (5 *Paige*, 554,) he says that a provision of the revised statutes prohibiting a sentence of nullity from being pronounced on the confession of the parties without other evidence, is in accordance with the ecclesiastical law; but that does not mean that the ecclesiastical law controls such actions in this state. On the contrary, in that case the chancellor notices the provisions of the revised statutes, (2 *R. S.* p. 144, § 35,) which enacts that all such proceedings shall be conducted in the same manner as other actions in courts of equity.

The only question then would be whether the petitioner had any interest in the matter, which would allow her to become a party to the litigation.

Whatever may be her relations, or feelings of affection for her child, that is not the interest which the law recognizes as entitling a person to become a party to a litigation affecting the daughter's rights. There must be some other interest, of a pecuniary character, and I know of none unless it arises from the relation of parent and child, depending on the right of the parent to the services, and the obligation of the parent to provide for and support the child during its minority.

There is no doubt that such responsibility exists on the part of the father. Does it also rest upon the mother after the father's death? In *Bartley v. Richtmyer*, (4 *Comst.* 46,) Bronson, chief justice, says, "at the common law the mother has not like the father a legal right to the services of a minor child." (*South v. Denniston*, 2 *Watts*, 274. *Davies v. Williams*, 10 *Ad. & Ellis*, N. S. 725.) In 2 *Kent's Com.* 205, it is said: "The father is bound to support his minor children if he be of ability, even though they have property of their own, but this obligation does not extend to the mother."

In *the Commonwealth v. Murray*, (4 *Binney*, 487,) it was held in regard to a minor child, whose father was dead, that although he owed obedience and respect to his mother, yet the law gave her no control over him, and she was not entitled to the fruits of his labor.

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I am at a loss to find any legal ground upon which to hold that the mother has any interest in the future prospects of her child who has married, even though such child be under age. That she is still entitled to respect and affection from her, no one can doubt, but, as before remarked, that duty, or the feelings of love and affection which she may entertain for her child, do not give her any legal authority to intervene as a third party in an action between the husband and wife; or to exercise any authority over her or her interests.

In the present case, also, there is another obstacle which, even if such right existed in the mother, would stand in the way of allowing her thus to interfere. It is that before any such application was made by the mother the suit had progressed and terminated. A guardian ad litem had been appointed, and the case had been tried before a referee, who had found as a fact in the case that such incompetency as was relied on by the husband existed at the time of the marriage. That report, and the evidence, had been submitted to Justice Davies at special term, and he had also found the fact to be as stated by the referee, and had thereupon ordered the dissolution of the marriage contract. This fact, for the purposes of this action, must be considered as established, until the judgment is reversed, and the finding cannot be reviewed on appeal.

I am free to say that from a careful examination of the evidence I entertain much doubt whether any such incompetency existed at the time of the marriage. The evidence in favor of its existence *at that time* is slight, and there is evidence to show that it may have been produced since, and the distinction between the existence of the difficulty at that time and at the subsequent period when more thorough examinations were made, does not appear to have been kept in view, when this case was before the referee. Had the case been properly defended and the attention of the referee been more directly called to the inquiry whether the state of the defendant, at the time of the marriage, was the same as it was found to be

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afterwards, more evidence would undoubtedly have been deemed by him to be necessary to establish that to be the fact. For such an inquiry, the evidence of the mother, the sisters or even the defendant herself should have been sought before the only fact upon which the plaintiff could succeed was considered to be established.

It is well said by the chancellor, in *Devanbagh v. Devanbagh*, (5 Paige, 557,) "In every case of this kind it is necessary that the court should proceed with the greatest vigilance and care, not only to prevent fraud and collusion by the parties, but also to guard against an honest mistake under which they may be acting merely from the want of proper medical advice and assistance." "If the allegations have neither been admitted nor denied by an answer on oath, the defendant should be examined on oath before the master as to the truth of these allegations."

It is unnecessary, however, to discuss this branch of the case, at the present time. If the petitioner has no right to intervene in this action, or to become a party thereto, it follows of course that she has no right to appeal from any decision made in the cause, so as to bring the merits thereof before the court for examination. It was said before the special term, and is repeated here by the petitioner's counsel, that the court may act on the information furnished by the petitioner acting as "*amicus curiæ*." In this character her application was received by the justice at special term, and for the purpose of obtaining more information on the subject, he suggested to the referee a private examination of the defendant as to her wishes in continuing the litigation. The result of that examination is contained in an affidavit of the referee, which shows that the defendant objects to any interference on the part of the petitioner, and an utter unwillingness on her part to engage in any proceeding to vacate the judgment of the court herein.

The views of this case above expressed, if correct, establish that the petitioner has no right to intervene in this action, either on account of her relationship to the defendant or on

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account of any interest which she may have in the litigation. That having neither a right to be a party from relationship or interest, there is no ground upon which she can ask to have the judgment opened or to be allowed to defend the action. That although the court may hear her communications as *amicus curiæ*, still that belonged exclusively to the special term, and gave no warrant for her, in that capacity, to appeal to the general term. The code provides for an appeal only by the party aggrieved. (§ 325.) This has been construed to mean a party to the record, or his representatives, and not any person who may feel aggrieved, when he is no party to the suit. It must be apparent, therefore, that the petitioner is in no way before the court so as to bring up for review the merits of that judgment, or to give the general term any authority for vacating or setting it aside, or granting a new trial. Even if we could do so, and permit the petitioner as the mother of the defendant to act in her behalf on account of her infancy, it would be of no avail against the wishes of the defendant. In December, 1857, she swears she was over 19 years of age. At the present time she is over 20 years of age. The lapse of a few months would bring her to the age of 21 years, when she would be relieved from the necessity of any guardianship, and be able to act independent of any control. If her determination and that of the plaintiff is as stated by them, to refuse all further examination into her case at the instigation of the petitioner, the delay would easily relieve them from her interference.

There is however a view of this case which is not free from difficulty. In all actions brought to obtain a dissolution of the marriage contract, whether for adultery or other causes, the court is charged with a duty which seldom devolves upon it, in other actions, and that is scrupulously to guard this proceeding from being used by the parties collusively, and not to suffer a judgment therefor without being fully satisfied that the cause really exists, as provided for in the statute. Whenever facts are placed before the court, which cause any suspicion

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that there is any such collusion between the parties, no matter in what way the facts are brought to the knowledge of the court, and whether at a special or a general term, and more especially when the defendant in such an action is a female under the age of 21 years, who from her condition both as a married woman and an infant, is entitled to the special protection of the court, it is the duty of the court at once to institute such an examination as will satisfy them that no such collusion exists between the parties. There are many circumstances in this case which certainly give a strange appearance to the mode in which the action has been prosecuted. It was commenced while the parties were living in the same house. A guardian *ad litem* was selected who was a friend of the plaintiff, living with him, not an officer of the court, as then required by the rules of the court. The proceedings were kept secret from all the relatives of the defendant. The judgment was obtained some time before the defendant was led to expect it. The proceedings were conducted with a haste not usual in legal proceedings of an adverse character, and scarcely with that regard to the rights of an infant wife which a guardian *ad litem* should have given to it. The complaint was sworn to on the 30th of November, 1857; the guardian *ad litem* appointed on the 8th December following; the answer put in on the same day, by his attorney; the cause noticed for hearing, on the same day, for the 10th December, and the guardian's attorney admitting due notice. The reference ordered on the 10th December, and the referee's report made on the 14th December, founded on the testimony of only one physician who had examined her, and the opinion of another who had made no examination, and on the examination of Dr. Cummings in Washington, under a commission issued on the 9th and taken in Washington on the 10th December, and a final judgment on the 18th December, on a notice of hearing of four days. To all these proceedings and all this haste, the guardian *ad litem* by his attorney was consenting in writing. And when afterwards the mother, hearing of these

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proceedings, came to her child and attempted to persuade her to inquire further into the legality of them, differences were created between them and they were finally separated, so that the mother has not since been permitted to see her child. Whether this was done at the request of the daughter or not is immaterial in reference to the point now under discussion. And lastly, when the mother applies to the court to have an inquiry into the propriety of these proceedings, we find the plaintiff and defendant, the guardian *ad litem* and both attorneys uniting in their opposition to any inquiry, and all concurring in one effort, viz. to sustain the judgment of divorce and to prevent any interference on the part of the mother in obtaining a rehearing of the case.

This unnecessary haste, concealment from the relatives, and union of all parties in behalf of the judgment of divorce, requires some explanation. What necessity existed for such haste that even the guardian had to consent to shorten the time that the law had given to the parties, is not disclosed by these proceedings; and when in addition thereto, the disagreement between the physicians as to the existence of the alleged incompetency is remembered; the uncertainty whether it existed before the marriage, as no other proof was furnished than the opinion of Dr. Nichols from an examination afterwards; the neglect to examine the defendant, her mother, or her immediate relatives, all tend to throw doubt on the propriety of the course which the parties have seen fit to adopt in this matter. Had the parties intended to obtain such a judgment collusively, without any real cause existing for it, other than temporary disease which proper treatment might have removed, no plan could have been more successfully adopted, and none more easily effected. I do not wish to be understood as imputing to the parties that such improprieties really exist, or that such collusion has really taken place; but that the circumstances are such as to call upon the court to institute an inquiry whether there was any such collusion or other cause for further examination into the validity of this judgment.

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For this purpose it appears to me proper that the court should order a reference to one or more suitable persons to inquire whether there has been any such collusion between the parties in obtaining this judgment, and for that purpose to call before them the parties and such other witnesses as they may deem proper. A reference was ordered at the special term, but not for this purpose. The object of that order was to ascertain whether the defendant wished to have the judgment opened, and had no reference to the order above suggested.

If upon such reference the court shall be satisfied that no ground exists for the charge made by the petitioner, the judgment will then be free from the imputations which may now be made against it, and no cause exist for any further objections thereto.

CLERKE, J. I concur in the disposition of this matter, proposed in the opinion of Justice INGRAHAM; but I differ entirely from that portion of it which intimates that the impotency of the defendant, at the time of the marriage, was not satisfactorily proved. The permanency of the physical *obstruction* referred to by some of the witnesses may be questionable; but I have little doubt her whole nervous organization was so shattered, and her sexual organs were in such a state of chronic irritability, if not congenitally defective, that she was incapable of consummating her nuptials; and we have no sufficient reason to suppose that her impotency is curable.

DAVIES, P. J., concurred with Justice CLERKE.

Judgment directing a reference, to inquire as to the existence of collusion between the parties, in obtaining the decree of divorce.

[NEW YORK GENERAL TERM, November 4, 1858. *Davies, Clerke and Ingraham, Justices.*]

THE PEOPLE, on the relation of Frederick W. Loew, and the said F. W. LOEW, *vs.* ISAAC B. BATCHELOR.

THE PEOPLE, on the relation of E. C. McConnell, and the said E. C. MCCONNELL *vs.* EDWARD S. MCPHERSON.

Where a power is to be exercised by several persons, a majority of the whole number may proceed to act, and their action will be legal, provided all the members composing the body are summoned to attend, or have notice of the time and place of meeting.

The right to have such notice is one which the majority cannot take away from the minority. All comprising the body are entitled to reasonable notice of the time and place of the meeting; and if all are summoned, or have notice, a majority attending may proceed to act, and the majority of that quorum will bind the whole body.

Where a statute conferred the appointment of clerks of the district courts in the city of New York upon the mayor and the members of the board of aldermen, or a majority thereof, and directed the meeting for that purpose to be in convention, and prescribed the mode in which such convention should be called together, and declared that it should not be lawful for the aldermen to proceed to make appointments in the absence of the mayor, unless after a notice to him of eight days, of the time and place of meeting; *Held* that this was a clear legislative declaration that notice should be given to all who legally composed the convention, before those who did attend should be authorized to proceed, in their absence, to act; and that in a case where five members of the body were not summoned to attend the meeting, and had no notice thereof, such omission was fatal to the legality of the meeting, and vitiated appointments made by those who did attend, although the members present constituted a majority of the whole number. INGRAHAM, J. dissented.

THE above suits were instituted to test the right of the defendants to the offices of clerks of the district courts of the city of New York, now held by them, respectively. The complaint in the first cause alleges that Frederick W. Loew was, on the 18th of December, 1857, duly appointed to, and is entitled to, the office now held by the defendant Batchelor; and in the second suit, that at the same time Edward C. McConnell was duly appointed to, and is entitled to the office now held by the defendant McPherson.

The facts found by the special verdict are, that the defendants were duly appointed such clerks, by the mayor and board

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of aldermen, in the month of December, 1851, and took the oath of office and entered upon the discharge of the duties thereof on the first day of January, 1852. The term of office of the defendants, respectively, was for the period of four years and until their successors were duly appointed and qualified. (1 *R. S.* 117, § 9. *Laws of 1851*, p. 271.) The plaintiffs in the first suit, claimed that Loew, and in the second, that McConnell, were duly appointed such clerks, at a convention of the mayor and board of aldermen, held on the 18th of December, 1857, in pursuance of the provisions of the act of April 10, 1855. (*Laws of 1855*, p. 502.) On the 14th of December, 1857, a resolution had passed the board of aldermen, calling said convention for the 21st day of that month. That the resolution of the 18th, rescinding the resolution of the 14th, and calling another convention on the 18th, designated the hour of meeting at half past six o'clock that afternoon, and that the same was passed at five minutes before half past six o'clock. That there were present and voting, on said last mentioned resolution, seventeen aldermen, the board then consisting of twenty-two aldermen; and the special verdict finds as a fact, that none of the aldermen had notice of the convention of the 18th of December, at which the plaintiffs Loew and McConnell were appointed, except the seventeen who were present when the resolution calling the convention on that day, was passed. That the mayor met in convention, on said 18th of December, with twelve of the aldermen, who had voted for the resolution calling the convention for that day, and it is claimed, duly appointed the plaintiffs Loew and McConnell, clerks of the district courts.

Jas. T. Brady, for the plaintiffs.

D. D. Field, for the defendants.

DAVIES, P. J. The only question which it is deemed necessary to consider is, whether the plaintiffs Loew and McConnell

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were duly and legally appointed by the convention held on the 18th of December, 1857. They were undeniably so appointed, if all the aldermen were duly notified of that convention, although some of them failed to attend; or if it was not necessary to its legality that all the aldermen should have had notice of the meeting. It should be borne in mind, we think, in considering the question presented, that the privilege of attending was not that of the aldermen, but of the constituency they represented. It was their right that their voice should be heard in the appointments to be made; and such right cannot be taken away unless all provisions of law have been complied with. The meeting was to be convened by the board of aldermen, or by a majority of the board of aldermen, and it was to be composed of the mayor and the board of aldermen or of a majority thereof. If the mayor should refuse to attend after notice of eight days to him, then it is made lawful for the board of aldermen, or a majority thereof, to proceed and make the appointments. (*Sec. 1 of the act of April 10, 1855.*) It was therefore competent for a majority of the board of aldermen to make the call for the meeting. But the statute proceeds to say that at the meeting there shall be present with the mayor, the board of aldermen, or a majority of the board. This provision was evidently intended to remove all doubts whether or not all of the aldermen should be present to constitute a legal meeting. It declared that a majority of the board were competent to act.

It was held by Eyre, Ch. J., in *Grindley v. Barker*, (1 Bos. & Pul. 236,) and adopted in our state in *Green v. Miller*, in 1810, (6 John. 39,) that where a number of persons are intrusted with a power, not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole. So it was held in this court in the case of *The People v. Walker*, (23 Barb. 304,) 1st. That when a private authority is conferred on several, all must concur, unless provision be otherwise made.

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2d That where a public authority is conferred on individuals (not on a court) who are to act judicially, all must confer together, but a majority may decide. 3d. That in public cases not of a judicial character, a majority make a quorum, if a majority may decide. These positions are well sustained by the learned justice, who delivered the opinion in that case, as well by reason as by numerous authorities. In that case, a statute required that a commissioner of juries, for the city and county of New York, should be appointed by the supervisors, the judges of the superior court, and the judges of the court of common pleas, without saying what should constitute a quorum, or whether a majority either of the whole body, or of the component parts, should be sufficient to appoint; it was held that *after due notice to all the persons* mentioned, a majority of the whole number constituted a quorum, and were competent to decide any matter on which the whole body had authority to act.

In the case referred to (*supra*) it was also decided that two days' notice, where no length of notice is prescribed by the statute, for all persons residing in the city, would be deemed sufficient notice.

In the statute prescribing the manner of appointment of these clerks, it is declared that it shall not be lawful for the aldermen to proceed to make the appointments in the absence of the mayor, unless, after a notice to him of eight days, of the time and place of meeting. It seems to us that this is a clear legislative declaration, that notice was to be given to all who legally composed the convention, before those who did attend were authorized to proceed, in their absence, to act.

In the case of *The People v. Whiteside*, (23 Wend. 9; S. C. 26 *id.* 634,) a notice of a joint meeting of the supervisors and judges of the county of Chautauque, for the purpose of making appointments, given and served on the judges, between the hours of two and four o'clock, for a meeting the same day, at five o'clock, was held sufficient; all the judges being in the same village where the meeting was to be held.

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In this case notice of the meeting was *given to all the judges*, and it seems to have been assumed that notice to all was necessary to constitute a legal meeting.

In the case of *Grindley v. Barker*, (*cited supra*,) Eyre Ch. J., says: "The cases of corporations go further; there it is not necessary that the whole number should meet; it is enough if notice be given, and a majority or a lesser number, according as the charter may be, may meet, and when they have met they become just as competent to decide as if the whole had met."

To the same effect is the case of the *Attorney General v. Davy*, (2 *Atk.* 212.) There, by charter, three of twelve persons named were authorized to choose a chaplain, and upon a vacancy, two of the three chose the chaplain. Lord Hardwicke said it cannot be disputed that whenever a certain number are incorporated, a major part of them may do any corporate act. *So if all are summoned* and a part appear, a major part of those that appear may do a corporate act, though nothing be mentioned in the charter, of the major part; and he was of the opinion that the three were a corporation for the purpose for which they were appointed, and that the major part of them might do any corporate act, and thus make the appointment. "At common law, independent of any specific constitution, when the power of acting is intrusted to any specific number of persons, whether definite or indefinite, any number of the whole body is sufficient to form a legal assembly, *if all be properly summoned to attend*." (1 *Kyd on Corp.* p. 401.)

The principle deducible from all the cases, we think, is, that where a power is to be exercised, like the present, a majority of the whole number may proceed to act, and their action is legal, provided all the members composing the body are summoned to attend, or have notice of the time and place of meeting. That the right to have such notice is one which the majority cannot take away from the minority; that all comprising the body are entitled to reasonable notice of the

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time and place of the meeting, and if all are summoned or have notice, a majority attending may proceed to act, and the majority of that quorum will bind the whole body.

In the present case, five members of the body were not summoned to attend the meeting, and had no notice thereof. We think this omission is fatal to the legality of the meeting, and consequently the plaintiffs Loew and McConnell were not duly and legally appointed clerks of the district courts, and that there must be judgment for the defendants, with costs, in each case.

CLERKE, J., concurred.

INGRAHAM, J., (dissenting.) I do not concur in the opinion of my brethren that a notice to all the members of the board of aldermen, other than that contained in the resolution, was necessary to make a valid appointment by the mayor and board of aldermen. The statute under which the appointments were formerly made, (*Laws of 1851, ch. 147,*) conferred the appointment on the mayor and board of aldermen, or a majority thereof, without designating whether it was to be by joint meeting or by separate action, and without any provision for calling any meeting for the purpose. This act was amended by the statute of 1855, ch. 293, which conferred the appointment on the mayor and the members of the board of aldermen, or a majority thereof. This statute directs the meeting to be in convention, and prescribes the mode in which such convention is to be called together, viz: by a direction of the board of aldermen. The statute also provides for a notice from the board of aldermen to the mayor, to procure his attendance, but for none from the board of aldermen to its own members. I do not think any such notice was necessary. The board of aldermen had the authority, by resolution, to direct the meeting to be held. Every member of that board was bound to take notice of the acts and resolutions of its own body. Every member ought to be present at the meeting of the board, and if present would know of the proceedings

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of the board. In the absence of any regulation by law to the contrary, no further notice of the meeting of the board of aldermen, to its own members, than the resolution as passed by that body, was necessary. The mayor had notice and attended. He was the only person under the statute, entitled to notice, and as he made no objection, the want of notice to the members of the board, is, in my judgment, no objection to the validity of the convention.

The legislature of the state often meet together in convention to make appointments, such as of senator, regents of the university, &c. This is done by a resolution fixing the time of the meeting. It would be no objection to the action of that convention, if members, either of the senate or assembly, who were not present, should say they had no notice of the joint meeting and were not in the body to which they belonged, when the resolution was passed. It was their duty to be present, and they must take notice of the action of their own body, at their peril. If they are absent, whether from want of notice or inability to be present, the convention is duly organized so long as a majority of the body is together.

Suppose the power of appointment had been vested in the board of aldermen alone; no other than the ordinary notice of the meeting of the board would be necessary to make the appointment valid; and where the meeting was held and some of the members were absent, a majority of the board would be competent to act. If the board of aldermen was legally in session when the resolution was passed, (and of this I do not understand that there is any doubt,) then a resolution passed by that board was notice to all, and all the members were equally bound by it, whether present or absent. The case of *Whiteside v. The People*, (26 *Wend.* 634,) shows that a majority may meet to make an appointment, and that a refusal by one body to proceed with the appointment, because they had no notice of meeting for such a purpose, did not invalidate an appointment made by the remainder. It has been held that a notice of a meeting is sufficient notice, and

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extends to adjourned meetings, without further notice. (*Scadding v. Lorant*, 5 *Eng. L. and Eq. Rep.* p. 16.) So in this case, notice of the meeting of the board of aldermen was sufficient to require the members of that board to take notice of a resolution then passed, calling a meeting at another time. All the authorities cited in this case relate to cases where notice was to be given to a body different from that giving the notice. I have been able to find none where such an objection has been taken in reference to the members of the body giving the notice of meeting.

I have only discussed the question as to the necessity of any other notice on the part of the board of aldermen, to its own members, than the mere passage of the resolution fixing the time of the meeting. If no such notice is necessary, the board would have authority to pass a resolution calling such a meeting or convention, immediately on the close of business, at any meeting of the board. If the attendance of the mayor be secured, such convention would be fully organized, whether all the members were present or not. I do not mean to be understood that the course of proceeding of the board of aldermen in repealing the resolution previously passed, and adopting another calling a meeting sooner and on a very short notice, was to be approved, but that merely as a question of law as to the power of the board to call the convention together, the resolution was sufficient and no other notice was necessary, except to the mayor, to secure his attendance.

There may be other questions of difficulty in regard to these appointments, but as my brethren have placed their decision solely on this point, in which I do not concur, I have not thought it necessary to examine them, at the present time.

Judgments appealed from affirmed, with costs.

[NEW YORK GENERAL TERM, October 4, 1858. *Davies, Clerke and Ingraham*, Justices.]

THE INTERNATIONAL LIFE ASSURANCE SOCIETY, of London,
vs. THE COMMISSIONERS OF TAXES.

THE PEOPLE, *ex rel.* The British Commercial Life Insurance
Company, *vs.* THE SAME.

As respects taxation, corporations not created by the laws of this state are to be regarded as non-residents; and if they transact business within this state they are to be assessed and taxed on all sums invested in any manner in such business, the same as if they were residents of this state.

Thus where a foreign insurance company deposits with the comptroller of this state, for the benefit of policy-holders, the securities required by chapter 463 of the laws of 1853, to enable it to do business here, the securities so deposited are liable to assessment and taxation.

But if any portion of the fund so deposited with the comptroller is invested in the stock of the United States, that portion is not taxable.

THE plaintiffs in the above entitled suits are foreign corporations, or associations organized under acts of parliament of Great Britain, for the purposes of insurance. By § 15 of chapter 463, Laws of 1853, it is provided that any company organized under the laws of any foreign government, is authorized to do business within this state, by depositing with the comptroller of this state for the benefit of the policy-holders of such company, citizens or residents of the United States; securities of the kind required by the 6th section of that act, for similar companies of this state; and upon appointing an attorney in this state representing the company, and upon whom all legal process can be served; and on doing these acts such company may commence business in this state. The plaintiffs in each of these actions have complied with the provisions of this act, by depositing with the comptroller, each, the sum of \$100,000, in the securities required by the act, and have each established an agency for the transaction of business in the city of New York. Of the sum so deposited by the plaintiffs in the second above entitled action, \$50,000 was invested in stocks of the United States.

The defendants, as commissioners of taxes, assessed each of the plaintiffs for the taxes of the year 1858, in the sum of

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\$100,000, as liable to taxation on this amount of personal property. The judge at special term held the plaintiffs in the first above entitled cause legally assessed to the full amount of the sum so deposited with the comptroller, and that the defendants had wrongfully assessed the plaintiffs in the second above entitled cause in the sum of \$100,000, and that said assessment should be reduced to \$50,000, on the ground that the \$50,000 invested in stocks of the United States was not liable to taxation. The plaintiffs appealed from the orders made in both suits, and the defendants from that part of the order made in the second suit, reducing the assessment therein to \$50,000.

J. W. Gerard, jun. for the plaintiffs in first suit.

C. A. Rapello and *D. Lord*, for the plaintiffs in second suit.

A. R. Lawrence, jun. for the defendants.

By the Court, DAVIES, P. J. Taxes are contributions imposed by the government for the support of the state. In all just governments it should be a cardinal principle that such imposition should be equal, and that all the property within the state should contribute its equal share of the burthen imposed. This is upon the principle that as all property within the state is equally protected by its laws and institutions, so all property within its boundaries should alike equally contribute to their maintenance and enforcement. In this spirit our revised statutes have declared that "all lands and personal estate within this state, whether owned by individuals or by corporations, shall be liable to taxation, subject to the exemptions hereinafter specified." (1 R. S. 387, title 1, § 1.) By section 5 of title 2, it is declared that every person shall be assessed in the town or ward where he resides when the assessment is made, for all personal estate owned by him, including all personal estate in his possession or under his control, as agent, trustee, &c.

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Corporations are to be assessed in the town or ward in which the principal office or place of transacting the financial business of such company is situated. (1 *R. S.* 414, title 4, § 2.) The property of these plaintiffs, they being non-residents of the state, would seem not to be taxable, unless the same is regarded as being in the possession or under the control of their agent residing in this state. That view of the case will be hereafter considered.

In the case of *Wilson v. The Mayor &c.*, (1 *Abbott*, 4,) it was held, after a very full and minute examination of the statutes, that persons not inhabitants of this state were not taxable, in their personal property, used and employed in business in this state. In other words, personal property could only be taxed where the owner resided. This case was decided in 1834, and probably had some influence upon the passage of the act of 1855. This act declares that all persons or associations doing business in this state, and not residents thereof, shall be assessed and taxed on all sums invested in any manner in said business, the same as if they were residents of this state. (*Laws of 1855, chap. 37.*) It is insisted on the part of the plaintiffs that this act has no application to them; that they are neither persons nor associations, and therefore are unaffected by its provisions.

They have each \$100,000 invested in the business carried on by them in this state, and which is declared to be a fund for the security of their creditors within the United States. The provision of our statute in reference to corporations is that they are liable to taxation upon their capital. (1 *R. S.* 414, § 1.) And the capital subject to taxation as such, is defined by the court of appeals to be that fund upon which the corporation transacts its business, which would be liable to its creditors, and, in case of insolvency, pass to a receiver. (*Mutual Ins. Co. v. Supervisors of Erie County*, 4 *Comst.* 448.) We have seen that these deposits made by these plaintiffs are to be held as a fund to meet their liabilities to their creditors. By the 6th section of the act of 1853, companies organized under

that act were to have a capital of \$100,000 before they could proceed to the transaction of business, and this in the 7th section of the act is denominated capital. On this capital our domestic corporations are liable to taxation, and the legislature has declared by the 15th section that no foreign corporation shall be permitted to transact any business within this state, until it deposits a like amount of like securities, and for the same purpose, with the comptroller. In these respects the foreign and domestic corporations are placed upon the same footing. Both become subject, to a certain extent, to our laws, and the supervision of the state comptroller.

Do the foreign corporations with their capital, of a like amount with the domestic, and both formed for the same purpose, stand in a more favorable position than the domestic, in reference to taxation? Is the foreign capital exempt while the domestic is taxed? Upon the point we are now considering, the solution of this question depends upon the construction to be given to the act of 1855. If its language is sufficiently broad to include these plaintiffs, then there can be no question that they have been legally assessed. It seems to us that the case of *The People v. Utica Ins. Co.*, (15 John. 358,) and the cases there cited, are quite decisive on this point, and the rules there laid down as applicable to the construction of statutes may well be applied here. (See also the case of *Ontario Bank v. Bunnell*, 10 Wend. 186.) We think it follows from these authorities, that this statute may be regarded as including corporations, and we conclude therefore that corporations not created by the laws of this state are to be regarded as non-residents, and if they transact business within this state they should be assessed and taxed on all sums invested in any manner in said business, the same as if they were residents of this state. As to their funds and means employed in business within this state, they have the same burthen imposed on them as residents of this state, and no greater. A corporation created by another state, it is now well settled, is a citizen or

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resident of the state creating it. (*Louisville Rail Road Co. v. Letson*, 2 *How. U. S. Rep.* 497.)

But supposing for any cause the corporation or association of the plaintiffs is not liable to be assessed and taxed, upon what principle can their property under the control and in the possession of their agent be exempt? Section 5 of title 2d, already referred to, (1 *R. S.* 389,) declares that every person shall be assessed in the town or ward where he resides when the assessment is made, for all personal estate owned by him, including all personal estate in his possession or under his control as agent, trustee, &c. Now we think it may be fairly argued that this fund deposited with the comptroller as a security for the policy owner, is in the possession and under the control of the plaintiffs' agents resident within this state, within the meaning of this section, and liable to be assessed. But as the assessment has not been made in that form, it is unnecessary definitely to pass upon this point.

As to that portion of the capital or fund of the plaintiff in the second suit, invested in the stock of the United States, we think the same is not taxable, and that the order of the special term in that respect was correct. (1 *Kent's Com.* 9th ed. 474, *Norton v. The City of Charleston*, 2 *Peters*, 449.)

The order appealed from by the plaintiffs in the first above entitled cause is affirmed, with costs; and the order appealed from in the second above entitled cause, is affirmed without costs to either party on the appeal.

[NEW YORK GENERAL TERM, November 4, 1858. *Davies, Clerke and Ingraham*, Justices.]

HARMON *vs.* THE NEW YORK AND ERIE RAIL ROAD COMPANY.

In a case free from fraud, a receipt, given by a common carrier, for a barrel, box, trunk or other article, shown to be hollow and to contain goods, means that the party who executes it has received the contents of the barrel &c., as well as the barrel itself.

Accordingly, where the agent of a rail road company, at New York, signed a receipt for a lot of furniture, among which was specified "1 cradle," which had a carpet wrapped around it, was bound with cords, and contained a valise with wearing apparel in it, which furniture was to be forwarded to Owego; and the agent was informed what the cradle contained; *it was held* that the company was bound to carry not only the cradle, but also the goods then in it, to Owego; and was liable for the loss of the goods. GRAY, J., dissented.

THE plaintiff, on the first day of January, 1855, delivered to the defendant, at New York city, certain goods to be carried on the defendant's rail road, by the defendant, as a common carrier, to Owego, in Tioga county. The defendant, by its agent, delivered to the plaintiff a receipt, when the goods were received at New York, in these words, to wit: "Received on board of the New York and Erie Rail Road, one lot of *furniture*, marked S. H., Owego, N. Y., in bad order, to be forwarded, at owner's risk of breakage, to Owego. New York, Jan. 1st, 1855. (Signed) BROWN."

A schedule of the goods was annexed to the receipt, and among the articles specified in it was "1 cradle." The action was brought in a justice's court, to recover the value of a valise and contents, which were in the cradle when the defendant received it and gave the receipt for it. The valise and other articles which were in the cradle, were not mentioned in the schedule annexed to the receipt. The cradle had a piece of a carpet wrapped around it, which was bound with cords when it was delivered to the defendant. The valise and other articles that were in the cradle were missing, when the goods were delivered to the plaintiff at Owego. The plaintiff offered to prove that the cradle mentioned in the receipt, (i. e., mentioned in the schedule annexed to it,) contained wearing apparel, when the valise was delivered to the defendant, and that

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the cradle was then wrapped up in a piece of a carpet and had cords around it; and that when the cradle arrived at Owego, the valise and contents were missing, and were never delivered to the plaintiff. The defendant's counsel objected to the proof offered, on the ground that *the receipt* showed the cradle was one of a large number of articles, agreed thereby to be carried, and no valise or contents were mentioned in it; and that the evidence offered would vary and contradict the terms of the receipt, which was not ambiguous and must speak for itself; also that the receipt was for freight, and not for personal baggage; and that the receipt could not be explained by parol evidence, so as to make it a receipt for personal baggage. The objection was overruled by the justice, and the defendant's counsel excepted.

A witness for the plaintiff then testified that when the cradle was delivered to the defendant's agent at New York city, it contained a valise and its contents, and some carpets; and that a piece of a thick carpet was tied over the cradle and bound by cords; that the valise contained two shirts, two coats, one pair of pantaloons, six shirt collars, four pairs of stockings, two vests, three or four night gowns, and some stockings. That nothing was in the cradle when it was delivered to the plaintiff at Owego, except the carpet that was tied around it when the defendant's agent received it at New York city. The plaintiff proved the value of the valise and contents; and gave evidence that the man who marked the goods and took a memorandum of them, when the defendant received them at New York city, was then told by the plaintiff that the cradle contained a valise and other things; and that the plaintiff told the man who put the goods on board the defendant's rail road boat at New York city, that the valise was in the cradle. The defendant gave evidence which tended to show that the plaintiff did not state what was in the cradle, or that any thing was in it, when the goods were received by the defendant's agent, at New York city. There was evidence given that poor men often send extra baggage

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on freight trains of cars, and that freight goes by weight, and that if the valise had been received separate from the cradle, the defendant's servants would have weighed and marked it; and there was evidence which tended to establish that the defendant did not carry extra baggage on freight trains; and that the charges for carrying extra baggage were double those for carrying furniture. There was some evidence that in shipping furniture the defendant's agents or servants put down, "box or chest," when marking the goods, to identify the packages; also if a man presented a trunk when moving, they took it down the same as other furniture, and all clothing. The defendant's agent received the freight on the cradle, valise and contents, which was calculated by the weight of the same.

Other questions were raised on the trial, but they were unimportant, and are not noticed in the opinion of the court. The justice gave judgment for the plaintiff, for \$30 damages besides costs. The Tioga county court affirmed the judgment of the justice, and the defendant appealed to this court.

Tracy & Edmonds, for the plaintiff.

Thomas Farrington, for the defendant.

BALCOM, J. The justice was undoubtedly satisfied by the evidence that the plaintiff practiced no fraud on the defendant; and that it was understood, when the receipt was given, that it bound the defendant to carry the goods then in the cradle, as well as the cradle itself, to Owego. And the evidence authorized the conclusion, arrived at by the justice, that the defendant's agent and servants, who received the goods from the plaintiff at New York city and shipped them, were informed by the plaintiff, when they received the same, that the cradle contained the valise and other articles, which were lost and never delivered to the plaintiff at Owego. It is probable that they inquired when they received the cradle, wrapped up in a piece of carpet and bound with cords, whether any thing was

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in it, and if so, what; and if they made such inquiry the plaintiff undoubtedly told them what articles were in the cradle, as one of his witnesses testified he did.

The valise and other articles in the cradle were not mentioned in the receipt which the plaintiff took from the defendant's agent when he delivered the goods to the defendant at New York city. The receipt only showed that the defendant received *one cradle* to carry to Owego; but the cradle was hollow, and it had a piece of a carpet fastened around it; and those who handled it and weighed it could probably tell whether any goods were in it, as well as they could tell whether a box is empty or contains goods, by handling and weighing it. But it is unnecessary to draw inferences upon this question; for the decision of the justice establishes the fact that the defendant's agent and servants knew the cradle contained the valise and other articles, when they received it and agreed the defendant should carry it to Owego.

Now conceding that the receipt was in the nature of a contract, (*see 2 Cowen & Hill's Notes*, 1439; 14 *Wend.* 26; 18 *Barb.* 32;) it was proper to construe it in the light of surrounding circumstances. (*Hasbrook v. Paddock*, 1 *Barb. S. C. Rep.* 635.) Hence it was competent for the plaintiff to show what kind of a cradle it was, and its condition when received by the defendant at New York city; also that it contained the valise and other articles; and that the defendant's agent and servants were informed thereof when they received it. (9 *Barb.* 477. 1 *Wright's Ohio R.* 240.)

When the justice was placed by the evidence, so that he could see the transaction as it appeared to the plaintiff and the defendant's agent at the time the receipt was executed, he easily discovered that the cradle might contain articles inside of it, as well as a box or trunk; and the evidence warranted the inference that it was customary for the defendant's agents and servants, in giving receipts for boxes or chests containing goods to be carried by the defendant, to designate them boxes

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or chests, without mentioning what they contained, or that they contained any thing.

A receipt by a common carrier for a box, to be transported to a particular place, does not necessarily mean an empty one; nor does evidence contradict a receipt for "*one cradle*," which shows that it was an article of household furniture, and was hollow, and had a piece of a carpet fastened around it with cords, and contained a valise and other goods. Such evidence only explains what was uncertain by the language of the receipt, and applies the receipt according to the intention of the parties.

And I am prepared to hold, in cases free from fraud like this, that a receipt given by a common carrier for a barrel, box, trunk or other article, shown to be hollow and to contain goods, means that the party who executed it has received the contents of the barrel, box, trunk or other hollow article, as well as the article itself: and it follows that when the defendant's agent signed the receipt, agreeing to carry the cradle from New York city to Owego, knowing what it contained, it bound the defendant to carry, not only the cradle but also the goods then in it, to Owego.

I am of the opinion that the justice committed no error in receiving the evidence objected to by the defendant's counsel, or in giving the judgment against the defendant; and that the county court did right in affirming his judgment. The judgment of the county court should be affirmed, with costs.

MASON, J., concurred in affirming the judgment.

GRAY, J., dissented.

Judgment affirmed.

[BROOME GENERAL TERM, January 5, 1858. *Gray, Mason and Balcom*, Justices.]

GEORGE PARISH *vs.* NATHAN W. WARD and others.

In the year 1809, George Parish, an alien, having been empowered by an act of the legislature to take and convey real estate, purchased a large tract of land, including lot No. 687, in the county of Jefferson. The defendant W. purchased of Parish a part of said lot, and took a deed which contained an exception of all mines and minerals, and particularly of all the ore of iron, copper or lead. Parish died in 1826 intestate, and without issue, leaving surviving him his father John Parish, and his brothers George, Charles, Richard and John, all of whom were aliens. In 1817 an act was passed, by the legislature, enabling George to take real estate by purchase or descent. In 1827 he made his will, devising all his estate to J. R. in trust, directing his real estate to be converted into personal estate, and the payment of two bonds held by his brother Richard; and devising the residue of his estate to Richard. He died in 1838. John Parish, the father, died after David's death, and before the death of George. In 1841 the plaintiff, who was the son of Richard, and an alien, was authorized to take and hold real estate. J. R., the trustee under the will, conveyed a large tract of land to the plaintiff, together with all mines and minerals reserved in certain deeds given by David, including the ore bed in question, located on said lot No. 687. In an action brought by the plaintiff to recover damages and to restrain W. and those acting under him from digging and carrying away iron ore from a bed on said lot;

Held, 1. That the act of 1807, enabling David Parish to acquire, hold and alienate real estate, invested him with inheritable blood, and clothed him with the power of transmitting his estate to his next of kin.

2. That dying intestate his estate would descend, the same as that of a citizen by birth; and would not escheat; provided an heir capable of taking by descent could be found.
3. That the act authorizing David Parish to take and hold real estate did not assume to qualify, or change, in any respect, the general law of descent; or to remove the barrier of alienism existing against alien heirs. And that therefore John Parish, the father of David, could not inherit from him.
4. That the estate of which David Parish died seised descended to his brother George, by virtue of the act of 1817 clothing him with inheritable power; and that under the provisions of that statute authorizing him to alienate, it was competent for him to make a will disposing of the property.
5. That the trust created by the will of George was valid, under the statute authorizing the creation of a power in trust to sell lands for the benefit of creditors; and that under the execution of the power in trust by J. R. the trustee, the plaintiff acquired a valid title to the bed of iron ore in controversy, and could maintain the action.

DAVID PARISH, an alien, having been empowered by act of the legislature to take and convey real estate, the same

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as a natural born citizen, purchased a large quantity of lands, including lot No. 687 in Antwerp in the county of Jefferson, in the year 1809. The defendant Ward purchased of the agent of Parish, by contract, a part of said lot, and after occupying several years took a conveyance, in April, 1826; which deed contained an exception of all mines and minerals, "and particularly all the ore of iron, copper or lead." David Parish died in 1826, intestate and without issue. He left surviving him his father John Parish, and his brothers George, Charles, Richard and John, all of whom were aliens and all were non-residents, except George, who came to this country to reside in the year 1815. In 1817 an act was passed by the legislature enabling George to take real estate within this state, by purchase or descent, the same as a natural born citizen. In 1827 he made his will, devising all his estate to Joseph Rosseel in trust, directing the reduction of the real to personal estate, to pay the expense of administration and two bonds of large amounts held by his brother Richard, and devising the residue of the estate to Richard. He died in 1838. John Parish, the father, died after David's death and before the death of George. In the year 1840 the plaintiff, who was the son of Richard, and an alien, was authorized to take and hold real estate in this state, the same as a natural born citizen.

Under the said will Rosseel, the trustee, conveyed a large tract of land to the plaintiff, together with all mines and minerals reserved in certain deeds given by David, which embraced the ore bed in question, located on said lot No. 687. This action was brought to recover damages, and to restrain the defendant Ward and the other defendants acting under him, from digging and carrying away iron ore from a bed on said lot.

The plaintiff succeeded in the action, at a circuit court held in the county of Jefferson, in December, 1853, before Justice W. F. ALLEN. The defendants appealed from the judgment to this court.

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J. Mullin, for the defendant.

C. G. Myers, for the plaintiff.

By the Court, HUBBARD, P. J. The important question in this case is as to the plaintiff's title to the mine of iron ore upon lot 687, excepted from the operation of the deed from David Parish to the defendant Ward. It was conceded on the argument that the exception was good, not repugnant to the granting clause in the deed, and that this action could have been maintained by David had he been living.

The plaintiff deduces his title under the execution of the trust in the will of George Parish, the brother of David, and the uncle of the plaintiff. The defendants' counsel disputes the title of George, on the ground of the alienage of David. It is insisted that the lands of which David died seised, escheated to the state. This presupposes that he left no heirs or next of kin capable of inheriting. The act of the legislature (*Sess. Laws 1807, ch. 21*.) enabling David to acquire, hold and alienate real estate in like manner as a natural born citizen, invested him with inheritable blood, and clothed him with the power of transmitting his estate to his next of kin. (*Banks v. Walker*, 3 Barb. Ch. R. 445.) Dying intestate, his estate would descend, the same as that of a citizen by birth. His estate would not, therefore, escheat, provided an heir capable of taking by descent could be found.

It is further insisted by the defendants' counsel, that if there was an escheat, the estate of David descended to his father, John Parish, who was living at his decease. The father, of course, could not inherit under the general law of descent, being an alien. If he was possessed of an inheritable quality, it must have been conferred by the act authorizing David to take and transmit real property. But that act simply empowers the taking and conveying of property by him, in the same manner as a citizen. It does not assume to qualify or change in any respect the general law of descent;

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or to remove the barrier of alienism against alien heirs. It may be that if the act had authorized the taking and holding of real estate, by David and his heirs, his father might have inherited on the ground of a presumed intent on the part of the legislature to extend the inheritance to such heirs as an alien was capable of having. Such seems to be the doctrine in cases of patents or special grants, or property acquired by an alien, under a special law authorizing lands to be taken and held by an alien grantee, to himself and his heirs. (*Goodell v. Jackson*, 20 *John*. 707. *Jackson v. Elz*, 5 *Cowen*, 314. *Jackson v. Adams*, 7 *id.* 367.) In such cases it is held that an alien heir may take. Upon this doctrine John Parish would have inherited from David, if this act had vested the estate in the heirs of David; unless it should be held that such inheritance was interrupted by the capability of George Parish, the brother of David, to inherit, under the general law. Whether any such interruption would exist it is not necessary to decide, inasmuch as it must be held that John Parish cannot inherit.

John Parish not being competent to take by descent, the next question to be determined is, whether the estate of which David died seised, descended to his brother George. That it did so descend, no doubt can be entertained. The act under which George was enabled to acquire real estate, (*Sess. Laws* 1807, p. 282,) expressly authorizes him to take, by purchase or by descent, the same as a natural born citizen. This clothed him with ample inheritable power, and he succeeded to all of David's estate.

The fact of the alienage of a common father, could not impede the inheritance between brothers. The inheritance between brothers is immediate. (*McGregor v. Comstock*, 3 *Comst.* 408,) George does not trace his inheritable line through the father. It has become a maxim of the law that as between brothers, a father, although a *medium sanguinis* is not a *medium hereditatis*.

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It is unnecessary to have a common ancestor, and hence the alienism of such ancestor is not important.

The whole estate having thus legitimately descended to George, it was competent for him under the statute authorizing him to alienate, to make a will.

Under the execution of the trust in his will, by Rosseel, the plaintiff derives title to the bed of iron ore in controversy. It was said that the trust created by the will was invalid, because Richard Parish, the plaintiff's father, was the sole beneficiary. In my judgment the trust is valid under the statute authorizing the creation of a power in trust, to sell lands for the benefit of creditors. Richard was an alien, and could not take by inheritance or devise.

He was a creditor of the testator to a large amount, in two bonds. It was the same in effect as though the residuum of the estate of David had been given to some third person, and not to the creditor. The trust being thus valid, the plaintiff acquired a good title by the conveyance from the trustee, Rosseel. He thus became invested with all the rights and title of David, in the ore in question, and could maintain this action, the same as David could if living. No question was made upon the argument, as to the capacity of the plaintiff to take under the grant. It follows then that the plaintiff was entitled to recover, and the judgment must therefore be affirmed.

[ONEIDA GENERAL TERM, January 1, 1855. *Hubbard, Pratt and Bacon*, Justices.]

WARREN vs. F. A. FENN & G. C. FENN.

A vendor, selling an equitable estate in lands and taking the promissory note of the purchasers, for the purchase money, has an equitable lien upon the land for the amount of the unpaid notes, in preference to the claim of voluntary assignees of the purchasers.

Thus where W. held an equitable title to a lot of land, by the assignment to him of a scrip or surveyor general's certificate of lands owned by the state, by which he was entitled to a deed from the state on the payment of \$17.00, and he assigned such certificate to F. & M. for the consideration of \$300, for which amount he took their promissory notes, payable at a future day, and such notes were not paid at maturity, and subsequently F. & M. being insolvent, made a voluntary assignment of all their property to the defendants, in trust for the benefit of creditors; *Held* that the plaintiff could enforce his equitable lien upon the land, for the amount of the notes, as against the claim of the defendants.

THIS was an action to enforce an equitable lien for the purchase money, upon an equitable interest in lands.

O. Ferris, for the plaintiff.

S. Brown, for the defendants.

By the Court, POTTER, J. Warren held an equitable title to 160 acres of land, distinguished as lot 32, in Schroom, Essex county, by the assignment to him of what is called a scrip or surveyor general's certificate of lands owned by the state, on which he was entitled to a deed from the state, upon payment to the state of \$17.00. This certificate he duly assigned to Francis W. Fenn and David S. Munger, on the 25th of March, 1857, for the consideration of \$300; for the payment of which Fenn & Munger gave him their promissory notes, payable 1st January, 1858. These notes were not paid at maturity, but afterwards, and on the 17th March, 1858, Fenn & Munger being insolvent, made a voluntary assignment to the defendants, for the benefit of creditors, of all their estate, including their interest in the said certificate.

The question now before the court is, whether the plaintiff has an equitable lien for the amount of his unpaid notes, in

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preference to the claim of the voluntary assignees of the vendees, of the said certificate?

The interest conveyed to Fenn & Munger was an equitable estate in lands. Such an estate has been regarded as real estate, and may be sold, charged, or devised by the vendee. (*Malin v. Malin*, 1 *Wend.* 658, and cases cited.) It is so treated by our statutes. Such an estate may be sold as real estate, by order of surrogates, for payment of debts. (2 *R. S.* 111, *marg. page*, §§ 78, 66.) And widows are entitled to dower therein. (*Id.* §§ 85, 88, 71, 72.) The plaintiff in law was a vendor. (*Burrill's Law Dic.* "vendor.") He took no security on the sale. He took the notes of the vendees, which are not regarded as security, and amount only to a specific settlement of the sum to be paid by them. The doctrine is so well settled, at this day, that it would be a waste of time to quote authorities to prove that the vendor of real estate sold has a lien for the unpaid purchase money, while the estate is in the hands of the vendee or his heirs, when no contract is made, either expressly, or from which it may be implied that the lien was not intended to be reserved. (1 *John. Ch.* 308. 7 *Paige*, 382.) The purchase money is *prima facie a lien*, and the *onus* lies upon the vendee, his heirs or assigns, to show the contrary. It is superior to the lien of a prior judgment against the vendee, (6 *Paige*, 310. 1 *Peere Wms.* 277,) and holds against subsequent purchasers who advance no new considerations. (3 *Barb.* 267.) The defendants are voluntary assignees, and are not, within the meaning of the law of equity, *bona fide purchasers*. They stand in no better position than their assignor did.. (15 *N. Y. Rep.* 195.) It has become one of the best established principles of natural equity, and the courts should ever be prompt to maintain it in its full vigor, that estates are to be regarded as unconscientiously obtained, when the consideration is not paid. To enforce such an equity, the court began at an early day to attach to the vendee the character of a trustee by implication for the vendor, and as holding the estate by contract, to be

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conveyed upon payment of the consideration. The doctrine of an equitable lien for unpaid purchase money was derived from the Roman civil law, and applied as well to chattel or personal property as to real estate. (*Mackreth v. Symmons*, 15 Ves. 344.) This lien is a part of the contract itself, and subsists against the vendee, and all claiming under him, with notice. This principle was adopted into the English common law, though they did not usually extend it to movable property, when there had been a transfer of possession. In this state it has been held that even though there has been a transfer of possession, if the goods were to be paid for by approved notes, or by giving security, the vendee remains a trustee of the vendor, till the approved notes or security is received, and also that a voluntary assignment of the vendee while in possession of the goods, did not defeat the equitable lien of the vendor. (*Haggerty v. Palmer*, 6 John. Ch. 437.) Though the estate here in question was not a legal estate, the doctrine of equity, above stated, equally applies. (1 Barb. Ch. 549. *Story's Eq. Juris.* §§ 1221, 2.) Although no reported case is referred to in our courts, where an equitable lien has been foreclosed, existing in only an equitable estate, yet there is no good reason why it should not be enforced in those estates as well as in estates where the legal fee existed in the vendor. (4 Kent's Com. 151, 2. 1 Hill. on Real Prop. 492, § 10. 4 Comst. 312.)

The plaintiff is therefore entitled to judgment to enforce his equitable lien for the amount of his unpaid notes, subject to the prior lien of the state for the sum remaining unpaid to them; and to an injunction restraining the defendants from disposing of the certificate in question, or of the lands therein described, until said notes are paid.

[WARREN GENERAL TERM, July 13, 1858. C. L. Allen, James, Rosekrans and Potter, Justices.]

CANFIELD and CHAPMAN *vs.* FORD.

Where a deed conveyed to the grantee, and to his heirs and assigns forever, all the mines, ores, minerals and metals in or upon certain lands described therein, together with the right to raise, work and carry away the same ; and the right to put up all buildings, and to use all lands that might be necessary for the purpose specified ; and the right of ingress and egress thereto, and therefrom, for the purpose of digging and working and carrying away said mines, ores, minerals and metals ; and all the estate &c. of the grantors of, in, and to the said mines, ores, minerals and metals ; to have and to hold the said mines, ores, minerals and metals, to the grantee, his heirs and assigns forever ; *Held* that the estate conveyed was an estate of inheritance, and was such an interest as comes within the intent and meaning of the provisions of the revised statutes relative to *partition* ; and that an action would lie for the partition of such interest.

The supreme court, as now constituted, has common law jurisdiction to partition real estate.

In a suit between tenants in common, for the partition of an interest in real estate, which has been carved out of the fee, the owner of the fee, who is the common source of title to all the tenants in common, is not a necessary party.

THIS was an appeal from a judgment entered upon the trial of the action at the St. Lawrence circuit, before a justice of this court, without a jury, in June, 1857. The action was for partition of real estate. Jonathan Fuller was originally the owner in fee simple, and the common source of title to the lands and premises in question. On the 6th November, 1847, Fuller and wife conveyed to Chillion Ford, the defendant, the interest in the lands in question, in three parcels described in the deed. The terms of the deed, with the covenants therein, sufficiently appear in the opinion.

Chillion Ford, on the 8th February, 1856, by a like deed as to form and covenants, conveyed to John Canfield one undivided half of his interest in the said three parcels of land. On the 19th January, 1857, John Canfield and wife by a like deed as to form and covenants, conveyed two undivided third parts of his one-half interest in said estate to the plaintiff Richard B. Chapman. Canfield and Chapman then bring an action for partition against Ford, the owner of the other half.

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The respective interests of the parties are correctly set forth in the complaint. The other facts in the case are fully stated in the opinion of the court.

Bishop Perkins, for the appellant.

W. C. Brown, for the respondents.

By the Court, POTTER, J. The only real question to be decided in this case is, whether the parties to this action have such an estate or interest in the lands in question, as is susceptible of partition by action?

It is conceded that Jonathan Fuller was the original source of title, and that he owned the entire estate in fee simple, in quantity and quality, and that the conveyance from him to the defendant, and from the defendant Ford to Canfield, and from Canfield to Chapman, in form and covenants, are alike. It is therefore sufficient to set forth one of these conveyances. On the 6th November, 1847, Fuller and his wife conveyed by deed to Chillion Ford the defendant "and to his heirs and assigns forever, *all* the mines, ores, minerals and metals, lying or being in, or upon the lands of the parties of the first part, situate, lying and being in the town of Depeyster, in the county of St. Lawrence, [describing three parcels of land,] together with the right to raise, work, and carry away said mines, ores, minerals and metals. And the right to put up all buildings, and to use all lands that may be necessary for the purposes aforesaid. And the right of ingress and egress thereto, and therefrom, for the purpose of raising, digging and working and carrying away said mines, ores, minerals and metals as aforesaid. And all the estate, right, title, interest, claim and demand whatsoever of the parties of the first part of, in and to the above granted mines, ores, minerals and metals. To have and to hold the above mentioned and described mines, ores, minerals and metals, to the said party of the second part, his heirs and assigns forever;" with a covenant

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to warrant and defend the same, in the usual form of a deed of warranty.

The revised statutes provide, that when several persons shall hold and be in possession of any *lands, tenements* or *hereditaments*, as joint tenants, or as tenants in common, in which one or more of them shall have estates of *inheritance*, or for life or lives, or for years, any one or more of such persons being of full age, may apply to the court for a division or partition of such premises, according to the rights of the respective parties interested therein, and for sale of such premises, if it shall appear that a partition cannot be made without great prejudice to the owners. Is the interest in question such an interest as comes within the meaning and intent of this statute? Either of the terms employed in this statute would seem to include the estate of the parties in this action. "*Land*," in its most general sense, comprehends any ground, soil or earth, whatsoever, as meadow, pastures, woods, moors, waters, marshes, furzes and heaths. (*Co. Litt.* 4 a.) It includes all things of a permanent and substantial nature; not only the face of the earth, but every thing under it or over it. (*2 Bl. Com.* 18.) "*Cujus est solum ejus est usque ad cælum, et ad inferos*." *Tenements* is a word of greater meaning and extent, sometimes, than land, and includes not only *land*, but rents, commons, and several other rights and interests issuing out of or concerning land. (*1 Steph. Com.* 158, 9.) "*Hereditaments*" is a still more comprehensive term in law, and includes whatever may be inherited, corporeal or incorporeal. (*2 Bl. Com.* 17.) These terms, therefore, seem to be comprehensive enough to include the estate in question. I think there can be no doubt that the estate in question is an estate of *inheritance*. It is so by the very terms and forms of the grant. The difficulty suggested upon the argument was, how to describe this estate, so carved out of the whole fee. If it is an estate that can be partitioned, the precise description is not very material, nor is the question as to what would be the rights of the parties after partition, at all neces-

sary to be discussed here. The latter question does not arise in this review. The counsel for the defendant has argued, with great force, that the right or interest which was conveyed as above stated is not a fee simple. In this, I think, he is mistaken upon authority. (2 R. S. 722, § 2.) It is not, however, necessary that it should be a fee simple, to entitle to partition. Whatever estate it may be, the owner has such an interest in it that he can maintain trespass *quare clausum fre-git* for any wrong done to it. (*Worcester v. Green*, 2 Pick. 429.) True, Lord Coke says, "an inheritance in fee simple expresses the largest estate that a man can have in land." But *Littleton* says, "This doth extend as well to all fee simples conditional and *qualified*, as to fee simples pure and absolute, for our author speaketh here of the ampleness and greatness of the estate, and not of the *perdurableness* of the same, and he that hath a fee simple *qualified* hath as *ample* and *great* an estate, as he that hath a fee simple absolute. So as the *diversity* appeareth between the *quantity* and the quality of the estate." (*Littleton*, 18 a.) And so also *Plowden* says, "that two fees simple *absolute*, cannot be at the same time of one and the self same land." (*Plowd.* 349.) That is, the mines, ores and minerals being land, a man may have a fee simple in them as well as he who holds the soil that remains unconveyed may have a fee simple, for they are not the self same land. A man may have a fee simple not only in lands, but also in advowsons, common, estovers, and other incorporeal hereditaments. So if a man grants to another all woods, underwoods, timber trees, or others, saving the soil, the grantee has a fee to take in "*alieno solo*." (*Crabbe on Real Property*, § 964.) The estate so partitioned, therefore, is an estate of inheritance, a fee simple. It is limited in quantity, not in quality. It is carved out of a fee simple absolute, and the latter having lost this *quantity* of estate, is itself qualified to that extent, without losing its quality of a fee simple. The estate in controversy, I think, may also be classified among estates, as a "corporeal hereditament;" and

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comes within the definition of that estate, to wit, "Such hereditaments as are of a material and tangible nature, such as may be perceived by the senses, consisting wholly of substantial and permanent objects, and may be comprehended under the general denomination of lands only." (*Steph. Com.* 159. *Bouv. Dict.* 288.)

The class of cases referred to by the learned counsel for the defendant, which may not be partitioned, are cases of mere license, or authority to enter upon another's land, and to do a particular act, or series of acts, without possessing any estate in the land. Such interests, it is true, cannot be partitioned. This class of cases is nearly allied to, and very often confounded with, a still superior interest in real property, called an *easement*, which is described as "a liberty, privilege or advantage in land, existing distinct from an ownership in the soil, and is founded on a grant by deed, or writing, or upon prescription, which supposes one, being a permanent interest in another's land, *without profit*, with a right at all times to enter and enjoy it." (3 *Kent's Com.* 452.) Such an interest, possibly, may not be partitioned. The distinction between the two classes of cases last above mentioned, and that of a permanent *grant* for a good consideration, of an interest in lands to be used for profit, to a man, and to his heirs and assigns forever, is palpable. There is still another distinction found in the old law books, existing in regard to estates of *inheritance*. Entire estates of inheritance *not divisible*, and estates that are *divisible*, and yet shall not be parted or divided between coparceners. Among the examples given of them, is found the following. If a man have reasonable estovers, as housebote, haybote, &c. appendant to his freehold, they are so entire, as they shall not be divided between coparceners." (*Co.* 164 *b.*) "So too of a pischarie incertaine, or a commons sauns nombre, or of a corody incertaine." (*Id.*) Another instance cited by Littleton, of estates that shall not be partitioned, is this: Lord Mountjoy, being seised of the manor of C. did by deed indented and enrolled, bargain and

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sell the same to one Browne in fee, in which indenture was contained a clause on the part of Browne, amounting to a grant by him of an interest and inheritance to Lord Mountjoy, his heirs and assigns, *to dig for ore in the lands*, (which were a great waste,) parcel of the said manor, and to dig for turf, also for the making of alum. In this case *three* points were resolved upon by all the *judges*, viz: *First*. That this conveyance did amount to a grant of an interest and inheritance to Lord Mountjoy, to dig, &c. *Second*. That notwithstanding this grant, *Browne* and *his heirs and assigns* might dig also, and like to a case of common "*sauns nombre*." *Thirdly*. That the Lord Mountjoy might assign his whole interest to one, two or more, but then if there be two or more, they could make *no division* of it, but work together with one stock. (*Co. Lit.* 164 b.)

It will be seen that the reason given by the *judges*, why partition could not be made in the case above cited, does not at all apply to the case in question. First, the exclusive right or all the right to mines, ores, &c. was not granted in that case, but a *mere right or permission to dig &c.*, the grantor and his assigns might also dig; and second, the extent of the grant being *uncertain*, the grantee might *surcharge*, to the injury of the tenant of the land. Interests uncertain in their extent, could never be partitioned. In the case now in question, the tenant would be bound to take the estate, subject to the terms of the conveyance, granting the exclusive right to all the mines &c., and of the right to put up *all* buildings, and use *all* lands that may be necessary for the purposes expressed, and the right of ingress and egress thereto and therefrom. The terms of the grant, by construction, being taken most strongly against the grantor, and the whole interest in the mines &c. being conveyed, it is immaterial to the grantor whether one person with fifty or more laborers, or fifty or more persons singly, should dig thereon, provided they use no more of the land than is necessary for the pur-

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pose of digging &c. all the mines, ores, &c. This is a *certain* grant, and no difficulty occurs in making equality of division.

But if the provisions of our revised statutes are not broad enough to include the power to partition, it has been settled that this court, as now constituted, has common law jurisdiction to partition real estate; (*Story's Eq. Jur.* §§ 646, 658. *Smith v. Smith*, 10 *Paige*, 470;) limited however to the power to divide estates *certain*. It is only necessary in a court of equity, to entitle to partition, so far as this point is in question, to show that equality can be obtained, in value, of lands; especially in advantages and profits redounding from each share to the several owners. (*Allnat on Part.* 10.) Whatever is capable of being divided may be the subject of partition in equity. (*Id.* 84.) The only remaining question raised in the case is, whether the owner of the fee qualified in quantity, out of which the estate in question was carved, ought not to be made a party to the action. The statute (2 *R. S.* 318, § 5,) requires that the petition (complaint) shall set forth the rights and titles of all persons interested therein, &c. What interest can Fuller, the grantor of this estate, have in the estate, which by deed he has conveyed away? In the estate sought to be partitioned he has no interest whatever. The partition in no respect affects the title of Fuller. He is not a tenant in common with the parties to the suit. They own separate portions of the estate, in severalty.

I think the judgment must be affirmed.

Judgment affirmed.

[FRANKLIN GENERAL TERM, September 14, 1858. C. L. Allen, James, Rosekrans and Potter, Justices.]

AMY BILLINGS *vs.* CLAUDIUS BAKER, PERRY P. BILLINGS and
others.

The acts of 1848 and 1849 "for the protection of married women," entirely abrogate the existence of prospective tenancy by the curtesy, and were intended to do so. ROSEKRANS, J., dissented.

Every quality and incident that is necessary to constitute a tenancy by the curtesy is destroyed by the provisions of those acts.

The husband cannot now be seised of the estate, during the life of the wife. It is not alienable by the husband. It is not liable for his debts. The estate cannot *vest* during the life of the wife. And as there is no *initiate* estate at her death, there is no estate to be consummated.

Those statutes are remedial in their nature, and should be construed with a view to the advancement of the remedy. The courts should look at the precise words used in the statute, and then construe them in their ordinary sense, unless such construction would lead to an absurdity or manifest injustice.

Before those statutes, the right of married women to hold separate estates, independent of their husbands, was recognized as a part of the common law.

The plain language of the statutes themselves expressly negatives any other construction than an abrogation of the estate of curtesy.

The *intent* of a remedial statute, like the intent of an agreement, is to be gathered from the plain language employed in it.

THIS was an appeal from an order made at a special term, upon a motion by the plaintiff to amend her complaint, by striking out the name of her husband, Perry P. Billings, as a defendant. The action is for partition of real estate, which came to the plaintiff by inheritance, since the acts of 1848 and 1849, "for the more effectual protection of married women." The husband was made a defendant under the impression that as the husband of the plaintiff, and by the birth of issue, and seizin of the wife during coverture, he had an inchoate interest as tenant by the curtesy. On the trial before a referee, one of the defendants was sworn as a witness in his own behalf. The plaintiff was then advised that her testimony became important in the action, in her own behalf, but that she was an incompetent witness, by reason of her husband's being a party. She then made the motion to strike out her husband's name, to enable her to be a witness in her own be-

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half. The motion was granted at special term, and was argued there by

H. W. Merrill, for the plaintiff.

C. S. Lester, for the defendant.

POTTER, J., delivered the following opinion, at the special term.

The facts set forth in the moving affidavits are sufficient to show that it is in furtherance of justice to grant this motion, and it must therefore be granted, unless the defendant Perry P. Billings, as the husband of the plaintiff, has either a present or prospective interest in the plaintiff's real estate. If he has such an interest, then the motion should be denied. At common law prior to the statutes of 1848 and 1849, the husband would have been tenant by the curtesy initiate, in such an estate; he is so still, if the estate was owned or acquired by the wife previous to the passage of those statutes, if the marriage was also prior to that time. If those statutes have either by their express provisions, or by necessary implication, abrogated prospective tenancy by the curtesy, then the defendant Billings has no interest in this action. Tenancy by the curtesy, is where a man marries a woman, seised at any time during the coverture of an estate of inheritance, in severalty, in coparcenery, or in common, and hath issue by her, born alive, and which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life "by the curtesy of England." (4 *Kent's Com.* 27.) The revised statutes, (vol. 1, p. 754, § 20,) expressly recognize the existence of this estate, and provide that "the estate of a husband, as tenant by the curtesy, shall not be affected by any of the provisions of this chapter." Four things are necessary to constitute this estate, viz: 1. Marriage; 2. Actual seizin of the wife during coverture; 3. Issue born alive; and 4. Death of the wife. (4 *Kent*,

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29.) The common law vested this estate in the husband, immediately upon the birth of a child. (2 *Black. Com.* 127.)

If the reasons for the introduction of this peculiar feature of the common law called "tenancy by the curtesy" in estates in land, had ceased to exist, if in practice the law failed to be useful; or if it had become an evil, or was inapplicable to our American system of laws, it presented a reason, perhaps a necessity, for a remedial act to abrogate it, and such remedial statute is then to be construed with reference to the condition of things thus presented. One of the reasons for the introduction of this estate into the English system, was, that the husband being the natural guardian of his child, was entitled to the profits of the land in order to maintain the child; but a more prominent and important idea of the system was, the reason that then existed in England in regard to all estates in land under the feudal law; to wit, that the husband having become dignified by having an interest in lands, was bound to do homage to his superior lord, and the interest being once vested in him, it was the policy of the feudal system, not to suffer it to determine during the life of the husband, as otherwise the lord might lose the homage that was his due from the land.

To this estate the husband never had any *natural* right. (*Bac. Abr. Tenancy by the Curtesy.*) Sir J. Jekyl says, "This estate has no *moral* foundation to support it." (*Green. Cruise, tit. 5, § 3.*) *Crabb*, an English writer, says, "The term curtesy is derived from courtesie, Latin *curialitas*; to signify suavity or urbanity, to denote that the custom sprung from *favor to the husband*, rather than from any *right*." By thus becoming the vassal or tenant of his superior lord, he was permitted "by the curtesy of England" to attend his lord's court, or curtis, (as it was called,) and to do him homage, by reason of having become the husband of a wife who had died possessed of an estate in lands, after issue born. Such were the reasons, and such the basis for the introduction of such a title to lands into the law of England. This common law

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was adopted into our system in this state, by the 35th section of the constitution of 1777. This examination of its history, of its basis, and the reason of its adoption, seemed to me to be necessary, in order to ascertain, first, whether such reasons continued to exist; and next, the applicability or basis of such a law to our own local system; and lastly, to examine whether these causes may not have had an influence in determining the *intent* of the legislature, either in continuing or in abrogating this feature of law in regard to real estate, by the acts of 1848 and 1849, above referred to.

There is no doubt that the legislature had the *power*, either to modify or abrogate this estate, at their pleasure, if it was regarded as public policy so to do. It was so held in *Sleight v. Read*, (18 Barb. 165,) and *Moore v. Mayor of New York*, (4 Seld. 114.) "It is not," says Denio, J., "a part of the marriage contract which cannot be affected or impaired by statute, but it stands on the foundation of positive law, as one of the institutions of the country." From this we see 1st. That the legislature had power to abrogate this estate as to all prospective cases; 2d. That every reason for the introduction of this estate into our system of law, except only that of the maintenance and support of the children, is entirely inapplicable to the public policy of this country, and to the institutions of this state; and 3d. That the provisions contained in those acts were intended to introduce a most important, if not an entire change in the existing law of this state in that particular. The question then is, have future estates of tenancy by the curtesy been abrogated by those acts?

The answer to this question depends mainly upon the construction to be given to (what seems to be) the very plain language of the act. In determining such construction, we must be guided by those sound rules of interpretation, which long experience and the settled wisdom of the courts have uniformly approved. This, as has been said, is to be regarded as a *remedial* statute; and its language is to be so construed as to give effect to the end the legislature had in view, and if

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possible to prevent a failure of the remedy intended. (1 *Kent's Com.* 465.) What then was the mischief felt, that was the occasion of, or created the necessity for, this statute? What was the object intended to be effected by it? Experience had shown that the only sensible reason for the introduction of this tenure into real estates, to wit, the maintenance of the children, had sadly failed of its object. The estate was not only alienable, but was also liable to the payment of the husband's debts. And it was found that in too large a proportion of cases, worthless, spendthrift and intemperate husbands, instead of using the estates intended for the support, maintenance and education of their children, exhausted them upon themselves, during their own lives, too frequently leaving the children objects of public care. What was the remedy? Let then this statute first speak for itself. The first section of the act of 1848 provides for the estates of females who may thereafter marry. It provides that her estate, real and personal, and the rents, issues and profits thereof, shall not be subject to the disposal of her (future) husband, nor be liable for his debts, and shall *continue* her sole and separate property, as if she were a single female.

The second section was intended to carry out the same provision as the first, in relation to estates of married women. It has been already judicially passed upon in various reported decisions; but its application to the property of the wife who was married at the time of the passage of the above act, is not a question necessary to be examined here, except so far as it goes to show the *intent* of the legislature.

The third section, as amended in 1849, provides that any married female may take by inheritance, or by gift, grant, devise or bequest, (from any person other than her husband,) and hold to her sole and separate use, and convey and devise, real and personal property, *and any interest or estate therein*, and the rents, issues and profits thereof, in the same manner, *and with like effect*, as if she was unmarried, and the same

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shall not be subject to the disposal of her husband, nor liable for his debts.

The next section of the act of 1849 authorizes trustees, who hold estates in trust for married women, to convey such estates to them, subject to certain regulations, for their sole and separate use and benefit. It might here be sufficient to inquire whether the estate of a female before marriage is not *absolutely* her's for life, forever—without condition—without qualification—and subject by law to be inherited directly from her by heirs. It is so, beyond all question. Whatever estate she then has in it, by the first section of the act of 1848, *shall continue her sole and separate property as if she were a single female*. This could not be, if any other person can acquire an interest in it. If the *intent* of a statute is to be construed in the same manner as the *intent* in a devise or settlement, the case of *Hearle v. Greenbank*, (3 *Atk.* 695,) is in point. The testator in that case devised an estate to trustees, “to and for the sole and separate use of his daughter Mary, wife of Wm. Winsmore, during her life, and at her disposal, and not to be subject to the debts, power or control of her husband.” And though a husband was entitled to a curtesy in a trust estate, yet Lord Hardwicke said: “The father, whose estate it was, has made the daughter a feme sole, and has given the profits to her separate use; therefore, what seisin could he, (the husband,) have during the coverture? He could neither come at the possession, nor the profits. To admit that the husband was seised, would be directly contrary to the father's *intent*.” And he held that the husband could not have curtesy. What single quality or incident that constitutes a tenancy by the curtesy is left, or remains to the husband, under this act? A tenancy by the curtesy, vested on the birth of a child. (2 *Bl. Com.* 127. 2 *Cowen*, 440.) This quality is now destroyed. It was an estate liable to be sold on execution to pay the husband's debts. (*Schermerhorn v. Miller*, 2 *Cowen*, 439.) This quality is also destroyed. The husband, as tenant by the curtesy, could alien and convey such estate. He has no such

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power now. One of the requisites to constitute this estate was a marriage. This statute cuts off this constituent in its creation, in advance, and expressly declares the wife shall *continue* to hold to her sole and separate use, as if she were a single female. So long as she lives, therefore, the marriage in respect to this estate, does him no good, for the estate cannot begin during her life. Lord Coke says, "Albeit the estate be not consummate till the death of the wife, yet the estate hath a beginning in the life of the wife." (*Co. Lit.* 30 a.) And when she is dead, as there has been no such estate to begin; at her death, there is none to be consummated. Actual *seizin* of the wife was another constituent quality of this estate. By such *seizin* of the wife, the husband became seised of his interest therein. This quality is also abrogated. Formerly the *seizin* of the wife became the *seizin* of the husband and wife; now it is a *seizin* for herself alone. By the provisions of this statute, there is not left to the husband one quality that is required to constitute a tenant by the curtesy initiate, nor one incident of the estate that he can enjoy. How then can it exist? It may be said, indeed, that since the passage of that act, so far as regards all prospective estates, a tenant by the curtesy initiate is a legal impossibility. Death of the wife changed the tenure from a tenancy by the curtesy initiate, to a tenancy by the curtesy consummate. Now there is no such tenure to be consummated or changed. As a tenancy by the curtesy initiate cannot exist or begin, how can the latter estate be consummated from it? How is it now to be constituted? If it can now be constituted, the legal definitions of its character must be changed, new qualities must enter into its composition, and a new definition must be prepared to describe it. And for what purpose, under our system of laws, and with our republican institutions? What one single argument can now be produced in favor of its usefulness, as a reason for retaining it? We have here no lords to whom we are bound to render homage. We are all equal peers. A citizen here receives no new dignity by holding an interest in lands.

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The maintenance and support of the child, which was a reason for the introduction of such an estate, is more certain now by directly inheriting from the mother, than to be dependent upon a father, whose dignity and importance consist in the fact of having been the husband of a wife who had an estate in lands.

The language of this act is entirely inconsistent with the idea that there is a tenancy for life existing in another person. Is there any such tenure or right as tenancy by the curtesy, attached to the estate of a single female? And does not this statute in the most express language declare that the wife holds this estate "as if she were a single female"? How then does he acquire a right therein? Does not the same statute declare that this estate "shall not be subject to the disposal of her husband"? What estate? Not his estate, but her estate; he has none in it. Is this estate, which was her's absolutely, and which the statute says *shall so continue*, limited to her for her life? By what law? The legislature had no power to limit an estate that was absolutely her's. How then does the husband acquire any rights to it? By the omission to give it to any body else? Are estates to land acquired by omissions in this way? He acquires no express statute right to it. He has no *natural* right to it by common law. (2 Bac. Abr. tit. *Tenant by the Curtesy*.)

The effect of this statute then, is that the useless and ridiculous fiction of "tenancy by the curtesy of England" is abrogated, and no longer remains to disfigure our system of common law, or the republican institutions of this state. Nor is the argument ended here. There are negative words enough in this statute alone to settle this question of intent, without going farther, to wit: "This estate (of the wife) shall not be subject to the disposal of her husband." If after her death, it becomes his by this English fiction, would it not, in the very face of the statute, be subject to his disposal? "Nor be liable to his debts," says the statute. If he has the use of it for his life, could he not pay his debts with it? Is this old remnant of an obsolete system still to be regarded as stronger

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than the negative language of an applicable, remedial statute? If this excrescence of another age was regarded as an evil by the legislature, is it to be supposed that they stopped half way, when attempting to apply the remedy of abrogation?

I think it more important, at this day, that the courts should adhere strictly to the sensibly expressed intention of the legislature, than to permit old maxims, applicable only to ancient observances of an obsolete system of feudal tenures, to control the construction of our own abrogating statutes. Our rights, under *remedial* statutes, ought to rest upon a surer basis than this. Even in England, it was held that in case of a *remedial* act, every thing is to be done in the advancement of the remedy that can be done consistently with any construction that can be put upon it. (*Johnes v. Johnes*, 3 Dow. 15.) Nor is the view I have taken of the construction of this statute, without high authority. In *Westervelt v. Gregg*, (2 Kern. 211,) Denio, J., said: "I am constrained to believe that the true meaning of the section is, (§ 2 act of 1848,) that all property which the wife owned at the time of the marriage, and that all such as she had acquired by gift, devise or otherwise, during the coverture, but before the passing of the act, should thereafter be deemed to be vested in her as though she was a feme sole, to the exclusion of any title which by the pre-existing laws the husband had acquired in it, by virtue of the marriage relation." To understand the whole intent of the legislature, the whole three sections of the act of 1848, must be read together, and by such a reading, no doubt can remain of the intent. We are at least bound to suppose that the legislature employed in this act such language as would most directly and aptly express the object they had in view; that they intended what they said, and the court, instead of looking beyond the act, for a construction to limit or cripple its *remedial* intent, will best discharge their duty by giving to words that obvious meaning which is consistent with the ordinary and common sense understanding of them. Why, if it was not the clear intent of the legislature to abro-

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gate the tenancy by the curtesy, did they by section two of the act of 1849, authorize trustees, holding estates for married women, to convey them to such married women? It was doubtless only upon the theory that she was to be sole owner. If by such conveyance the husband acquired a vested interest in the estate, the very object of the trust estate might be thus defeated. I cannot be made to doubt, upon the considerations above expressed, that the legislature intended to make, and did make, an entire and radical change in the law applicable to the condition of things as they existed here; a change demanded by the highest considerations of public policy, dictated by demands of the purest benevolence, and resting upon a sound basis of practical good sense. It is of itself a consistent and reasonable statute, suited to the genius and spirit of the age, and to the wants and institutions of a country whose laws lay claim to the basis of equality of rights. It is entitled to fair judicial construction by the courts, having reference to the existing mischief, and to the intended remedy, divested of the clogs to progress, by a veneration for any of the ancient relics of feudalism. It would fail of being the remedial statute intended, if it did not remove the unjust disabilities of the wife, arising from coverture, and substitute in some degree, a sensible, living, practical equality, for the exploded fiction that the legal existence of woman, as well as her estate, is merged in a husband by marriage; nor only that, but that her own subsistence for her life, as well as the support and maintenance of her children after her death, of an estate derived perhaps solely from her, are to be put at more than the peril of loss, that a husband, whether worthy or worthless, may be dignified by its control. We have already seen that the reasons for its introduction into a system of law, no longer exist. There is found in practical experiment no such superiority in the husband, in regard to a provident management of estates, that demands its longer continuance.

Divesting then this question, as I do, of all reference to common law tenures, which were intended to be abrogated,

and construing this remedial statute by the light of its own plain intent, as manifested in its clear and express language, the parties in interest are restored by it, in degree, to their natural rights. What are they? The right of independent existence on the part of the wife—the right to enjoy property, and the right to a certain support, and maintenance of her children. These are as strong by nature, and have as high a claim to consideration and protection upon public justice, as the claims of the husband's superior dignity. The very spirit of our government is, and it should be of our laws, that the rights of each citizen to support and protection, whether infant or adult, whether male or female, husband or wife, shall stand upon an equality, and the power of any one so to control the rights or interests of another, as to annihilate or destroy them, is contrary to nature, and should be subject to the control of law. The courts for a long period, had been gradually relaxing the rigid rules of the common law, in order to aid married women in the protection of their estates, against improvident husbands. And equity, especially, has been prompt to uphold marriage settlements, devises and conveyances in trust for them, until "a wife's equity" had become one of the institutions of the country. (*Sleight v. Read*, 18 Barb. 162.) And the civil law, still more reasonable, ever regarded the husband and wife as being separate and distinct persons in regard to their estates. (2 *Story's Eq. Jur.* § 1368.) And as authority to sustain the interpretation of this statute which I have given, I find it laid down as a rule, that even in legal estates, unless the husband had possession during the coverture, so as to be in the receipt of the rents and profits, he was not entitled to curtesy. (1 *Bright on Husband and Wife*, 120.) So too, in the settlements of estates upon the wife, when the intention manifestly appears in the deed of settlement, that the husband should have no interest in the estates so settled upon the wife, she is converted into a feme sole during her life. In such cases, whether the equitable inheritance devolved to her as heir, or by limitation immediately, or after intermediate

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limitations, her husband will not be entitled to curtesy, and if it be a trust to be carried into effect in equity, the court will so model the decree as to prevent curtesy. (1 *Bright on Husband and Wife*, 137.)

With all my veneration for the common law, whenever its existence is found to be inconsistent, not only with the just and equal rights of a class of citizens, but in direct conflict with our remedial statutes—when I find its existence has neither a natural nor a moral basis to sustain it—I must find a more solid reason for its retention than the ancient custom of rendering homage to a superior lord, in order to create any reverential awe that shall restrain me from an examination as to its usefulness, or hesitation about construing a statute sensibly, for fear of derogating from the ancient glory of that system.

I have come to the conclusion above expressed, but I admit, not without much embarrassment, on account of the highly respectable authorities deciding the same question the other way. I refer to *Hurd v. Cass*, (9 *Barb.* 366,) per Mason, J., at special term; and *Clark v. Clark*, (24 *Barb.* 581,) per Marvin, J., also at special term; the latter, however, basing his opinion mainly on the former. But what is a little singular, the last authority cited by Justice Marvin, is directly against the conclusion he himself arrives at, to wit: *Crabb on Real Property*, § 1106. In his conclusion, the learned judge also says: “If the legislature had intended to deprive the husband of his rights by the curtesy, when the wife had not conveyed or devised the estate, it should so have expressly declared in the act.” With all deference, I think if the legislature after passing an act, which in its express terms did take it away, had intended still to retain it in the system, they would have said so, as they did in the 1st *R. S.* 754, § 20, in which such a reservation seemed to be necessary, in order to secure it from abrogation. I find no reported general term decisions directly upon the question. I find nothing in the case of *Colvin v. Currier*, (22 *Barb.* 372,) in conflict with the

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views I have expressed, but on the contrary, much to sustain them. That case holds that the estates of the wife under the acts of 1848 and 1849, are her separate legal estates. The case of *Sleight v. Read*, (18 *Barb.* 159, 164, 165,) I regard also as sustaining my views. The case of *Shumway v. Cooper*, (16 *Barb.* 560,) is also cited by the defendants' counsel on their side. This is a general term decision, in the 5th district. I have read the very able opinion of Justice Allen, in that case, and find that this question did not arise there at all. It was the rights of a husband under the statute of distributions, not the common law rights of a tenant by the curtesy, that were discussed in that case. That statute gives the husband, as administrator, the right to his wife's personal estate. (2 *R. S.* 98, § 86, [79.]) That statute, it was held in that case, was not repealed by the acts of 1848 and 1849, but was modified in this particular, that the wife possessed the power during her life, to dispose of her personal estate, which if she failed to do, the husband took as before, under the statute. There is a case (*Benedict v. Seymour*, 11 *How. Pr. R.* 176, 177,) which so far as it goes, sustains my views, though the question of tenancy by the curtesy, did not directly arise in the case.

The motion must be granted on the payment of costs of opposing the motion, it being a motion for a favor.

From the order of the special term there was an appeal to the general term, where the motion was argued by

A. Pond and *A. Bockes*, for the defendants.

H. W. Merrill, for the plaintiff.

By the Court, POTTER, J. The court are unanimous in affirming the order of the special term, but upon the question on which almost entirely it was argued at the special term, and again here, to wit: whether Perry P. Billings the plain-

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tiff's husband has an interest in the estate proposed to be partitioned, one of my brethren dissents from the opinion here expressed.

It is exceedingly important that this question should have an early and a correct settlement, on account of the frequency of the occasions on which the question must necessarily arise in future practice. It is certainly most natural that different and various constructions should be given to the meaning of this statute, for the reason that it makes important changes in the law in regard to the marital relation, so far as the rights of property are concerned. These somewhat extraordinary innovations in established law in that regard, are in conflict with such opinions as time and long experience had adopted as settled, and which had become familiar to the courts and to the bar; but it now being a law, and proceeding as it does from the highest source of power authorized to enact laws, it is the duty of the court to give it due regard, and to construe it according to its true spirit and intent; and it is therefore not at all surprising that at first, like all other measures of sudden and violent reform, it encounters the prejudices arising from long established and fixed habits of thought; from a committed feeling of regard and veneration for ancient forms, precedents, maxims and adjudications, and be subjected to a jealous criticism of its new and somewhat unfamiliar forms of expression. The highest court of this state, however, has already broken ground in this particular, and has declared in regard to it, as follows: "The object of the statute is *remedial*; to remove the disability which the common law attached to coverture, and to enable a married woman to have something which she might call her own, and to do something for her own subsistence, and that of her offspring;" and also, "that the act should have a liberal construction." (*Darby v. Callaghan*, 16 N. Y. Rep. 79.) In the case of *Wadhams v. The American Home Miss. Soc.* (2 Kern. 415,) Denio, J., says: "The statute of 1848 was the commencement of a *new system* respecting this branch of domestic relations." Con-

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struing this statute then, in the spirit that it becomes the duty of the court to construe a remedial statute, giving the fullest effect to every provision that can consistently be put upon it in order to advance the remedy; or in other words, considering that "the court is to look at the precise words used, and to construe them in their ordinary sense, unless this construction would lead to an absurdity, or manifest injustice," let us see what is its real intent, as it regards the question at issue. The question is, do the provisions of the acts of 1848 and 1849, in the cases therein declared, vest the *whole* title of the estates in married women, or has the husband, notwithstanding the plain and comprehensive terms employed in this statute, a vested, inchoate interest therein? It must be borne in mind that the object of this statute is to enfranchise a class of citizens, or to restore them to natural rights, and to create a new estate; not to modify an old one: it relates to the rights to estates in the future; not to the past. It must then be construed with reference to its own objects, more than to such objects as relate to existing estates; and as it does not in any degree interfere with the latter, so the latter have no claim to a participation in this new estate, unless it is so expressed in the charter of its creation. "*Expressio unius est exclusio alterius.*" Let us look at this estate then for a moment, as at the object of a new creation, divested of its connection with the past, with existing or with other systems of law affecting those relations. This, I apprehend, is the light in which one should view its remedial provisions, and looking at it in the light of its own clear language, see what conclusions the philosophy of plain common sense would determine to be its meaning. A married female "may take by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property, or any estate or interest therein, and the rents, issues and profits thereof, in the same manner and with like effect as if she were unmarried." This seems to be clear, plain language, quite sufficient in the com-

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mon mind, for the full creation of a new estate; and unless this grant is to be controlled by something *not* expressed in its language—by something to be incorporated into it by the power of construction, in regard to the rights of some ancient tenures entirely repugnant to its spirit, and with which its language seems to have no relation, except so far as in conflict and intended entirely or in degree to change that character—the ordinary understanding would experience no difficulty in comprehending its meaning to be that the *whole* estate so to be created, and that could be enjoyed, with all its incidents, would belong to such married woman, precisely as if she were a *feme sole*, and like the estate of a *feme sole*, at her death, in the absence of a devise, would descend to her heirs. Nor is the common sense understanding of its meaning in conflict with the construction already given to it by the courts. The court of appeals in *Darby v. Callaghan*, (*supra*), in speaking of the language used in this section of the statute, say: “These terms embrace every species of property known to the law.” If, then, every species of property known to the law, is by this new creation conferred upon the married woman, it is difficult to see, when no interest whatever therein is given to any other, how such other can claim it. There is no other statute “*in pari materia*,” to be construed with it. There are no reservations of the rights of others, contained in it; it interferes with no vested rights; because it is prospective. There are no rights obtained by the marriage contract which are affected or impaired by it, for all these rights stand upon the foundations of positive law. (4 *Selden*, 114.) But this statute depends not upon itself alone—upon its own simple, plain provisions—upon the common sense understanding which its own clear phraseology demands for construction and the intent to be derived from its terms. The courts generally have also been prompt to sustain its *intent*. In the case of *Colvin v. Currier*, decided at general term, in the 7th judicial district, (22 *Barb.* 382,) E. Darwin Smith, J., says: “The acts of 1848 and 1849, were statutes passed in furtherance of the

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policy of relaxing the strict rules of the common law in respect to married women. Those acts repeal the common law rules giving the husband a right to the personal property of the wife, and *a freehold interest in her estate of inheritance*, and subjecting the same to the payment of his debts. *These acts were designed to take away the marital rights of the husband in respect to such property of the wife.* The evil complained of was the too great subjection of the property of the wife at common law, to the control of the husband, and his creditors."

It is argued that these statutes must be construed with reference to the law as it existed at the time of their passage, and that the rights of husbands as they existed before the passage of these acts, are, by the rules of construction, to be carried into and incorporated with the provisions of this new law, for the reason that there is no abrogation of such rights in the express language of the statute.

It becomes important then, for the purpose of duly weighing this argument, to inquire what were the respective rights of husbands and wives to estates, prior to the passage of the acts of 1848 and 1849. First, in regard to married women, it may be said that ever since the day of Lord Hardwicke, and even before that time, in the English court of chancery, and also in our own, separate estates of married women, with their right to dispose of them as *femes sole*, independent of their husbands, have been recognized, and they have been permitted to hold such estates divested of the husband's right, "*jure uxores*," or by the curtesy, either through the intervention of trustees or without. Sometimes the husband in equity was deemed and constituted such trustee, without having other interest therein. (*Sturgis v. Corp*, 13 Ves. 190. 1 Ves. jun. 517, 303. *Peacock v. Monk*, 2 Vesey, 190. *Fettiplace v. Gorges*, 1 Ves. jun. 46. *Bell on the Laws of Property*, 513. See cases cited by Spencer, C. J., in *Jaques v. Methodist Epis. Church*, 17 John. 578, 9; *North American Coal Co. v. Dyett*, 7 Paige, 15; 2 *Bright on Husband and Wife*, 214; *Strong*

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v. *Skinner*, 4 Barb. 546.) And even a court of law has extended its protection to the wife against the husband, when no trustees were appointed in the deed by which her title to separate property was created ; the court holding that persons named in a will as trustees of the person from whom she claimed were also to be considered trustees for her. (2 *Bright on Husband and Wife*, 215.) These separate estates which the courts of equity have so recognized their right to dispose of as *femes sole*, have generally been created either by deed, devise or marriage settlements.

This class of estates includes vested remainders, and all other estates of that character, such as estates where there has been no actual seizin, and estates that would entitle the husband to curtesy. (4 *Comst.* 28.) And all such estates pass by the deed of the wife, with her simple acknowledgment, without a private examination. (*Id.*) All this simplicity of form, and this exercise of equitable power, has been attained, not without the severest struggles with the jargon of black letter lore, and the stale precedents and ancient maxims and traditions handed down from age to age, derived from the barbarous customs of a bygone era. And notwithstanding the estate of curtesy is an estate that has ever been favored with a tenacious and unreasonable partiality by the common law of England ; so much so as, even to hold that it existed in trust estates, where there were no words of exclusion in the devise or deed creating the estate ; yet as early as the year 1738, Lord Hardwicke, one of the most distinguished of English chancellors, held that where, in a settlement, or devise of an estate to a *feme covert*, to hold as a *feme sole*, and to her separate use, in language clearly expressing the *intent* to exclude the husband from curtesy and *seizin*, the estate descended directly to her heirs, and the husband had no interest therein. (*Roberts v. Dixwell*, 1 *Atk.* 607.) This case was followed by a like decision in *Hearle v. Greenbank*, (3 *Atk.* 695,) decided in 1748. These two cases, however, were but following the decision of *Bennett v. Davis*, in the year 1725, by the master of the rolls,

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under Lord Chancellor King. (2 *P. Wms.* 316.) These decisions have been regarded as law, unshaken by any authority that I am aware of, to this day. Such then was the law of equity at the time of the passage of the statutes of 1848 and 1849. In equity, therefore, married women were not only authorized to hold separate and independent estates, and the rents, issues and profits thereof, free from any control of their husbands, but were also authorized to devise and convey the estates by deed without private examination, untrammelled by rights *jure uxoris*, or of curtesy. What more, then, is the effect of these statutes, but to establish as a legal right, without the interposition of the courts, what before was regarded as a well settled equitable right by their aid, viz: a separate estate in the wife? It is just that, no more. For what sensible reason should the distinction exist? Why shackle and trammel the estate of a married woman with the expensive paraphernalia of trustees, and commissions, and deeds of settlement, and agencies, when the same language enacted, in a plain spoken statute, performs this duty? Why, when the two systems of law and equity are to be administered by the same court, should there be two systems of law controlling the estates of married women? Why, in this noon of the 19th century, and under a free government, are we solemnly warned against innovations upon the common law as it existed, and the legal precedents established in the days of the Norman conqueror? Did all knowledge exist in the past? Is the glory of the ancient common law so dazzling, that the learning of the present day, and all the attempted reforms upon the system to meet the wants of the age, are to be regarded as dangerous experiments? With melancholy auguries against progress I have no sympathy. For theories which have no support but antiquity I have no veneration. For the outcry against innovation upon the mysterious excellence of the English common law, which I cannot behold, I have no reverence. I hold an honest, sensible construction of the statute, according to its true intent, to be practical wisdom; and that

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the spirit of justice, befitting the wants of the age, is the soundest philosophy in a system of law. I regard it as a humiliating admission of intellectual decline, and worse than weak superstition, to assume that all wisdom existed in the former common law of England, or that laws suited to the condition of a free government could only be framed by the ancient inhabitants of Britain, whom Blackstone with fond partiality calls "our Saxon *princes*;" nor do I believe that it is *only* in the annals of *past* ages that we shall look for the wisdom necessary to guide us in our own. As changes are wrought in the circumstances of a people, or country, it is necessary, not only that their laws themselves, but also the spirit of the laws should be accommodated. I bow with willing submission to the shrine of legal reason. I am not opposed to seeing it traced to its sources, nor to explore its earliest teachings; but "*tempora mutantur et nos mutamur in illis*."

Having shown the equitable condition, let us next inquire what were the *legal* rights of the husband, in the real estate of the wife, before the passage of the acts for the more effectual protection of married women, and what effect those acts have upon such rights.

At common law, a man by his marriage to a wife who had an inheritance in lands, became possessed of a freehold interest, "*jure uxoris*," that is, he and his wife became seised of the estate in *her right*. This marriage and *seizin* gave to him a title to the rents and profits during coverture. This estate, according to Lord Coke, he shall receive as "governor of the family." This incipient title he possessed independent of the birth of issue. Indeed the tenancies by the curtesy *initiate* and *consummate*, are but continuations of this first estate. (*Barber v. Root*, 10 *Mass. R.* 263.) This primary freehold interest of the husband was assignable by him, and was subject to be taken on execution for his debts. This was an estate enduring for the joint life of himself and wife. Upon birth of a child, the second step towards perfecting it, the estates of tenancy by the curtesy became *vested* and formed the estate

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initiate; and thirdly, by the wife's death it became *consummate*. The husband then had the whole estate for his life. Each of these two latter estates, like the first, were alienable by him, and were liable on execution for his debts. So that from the time of marriage, the wife lost all power and control over her estate, both in the freehold and in the *inheritance*, during his life. In this view it will be seen that the whole estate, freehold and inheritance, which had all equally and in an undivided unity, been *the estate of the wife*, was by marriage, and its consequences, no longer practically the *property of the wife*, but was severed into parts, and formed into different and distinct estates, neither one of which estates could she, ever again, during his life, enjoy or control.

Taking this view of the loss, in effect, of her whole estate—of her unjust, unnatural exclusion therefrom, and her consequent helpless condition—it furnishes, in my judgment, a sufficient explanation for the form or style of the title of the statutes in question, to which much of the argument was devoted; and sufficiently shows that *the* estates which these statutes were intended to protect, *is the estate*, which, except for her marriage, would be entirely her's, but which *by* her marriage, she would, in effect, entirely lose. The process of reasoning by which it is demonstrated that an act which refers to this estate as "the property of married women," by one general term, plain to the commonest understanding, can be construed to mean a *divided* portion of it, to wit, an estate in her during her life, I cannot appreciate. Why is it, if this *divided* portion of her property, only, was meant, that this plain spoken statute did not say so in terms? True, there might have been added to the title the words "and to restore them to their natural rights," but it was far better to have that provision in the body of the act, than in the title. The title is no part of the act, and can never be used to control or restrain any positive provision of the act.

But is it not the whole estate that this statute permits a married woman to take? And is it not this whole estate that

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the statute is to protect? Would not the words of this statute, if made applicable to males, confer on them the whole estate? Do they confer less when made applicable to females? Are words of *inheritance*, necessary to be expressed, in order either to create an estate, or to entitle heirs to inherit from her? On the contrary, is it not now a provision of our revised statutes that the whole fee passes, unless the intent to pass a less estate shall appear in express terms? (1 R. S. 748.)

Thus stood the common law of England in relation to such *legal* estates, and thus it became the common law of this country, first by adoption, and next by a statute recognizing its existence, (1 R. S. 754, § 20,) when the acts for the more effectual protection of married women were passed, in 1848 and 1849. These acts, we may safely assume, were *intended* by the legislature to effect *some* change, in regard to the estates of married women, or they would not have been passed. What changes they did effect are now questions for the courts. They could work *no* changes upon *existing* estates. The rights as to them, had become *vested*. (*Westervelt v. Gregg*, 2 Kern. 211.) They must therefore apply to prospective estates, according to the general rule of construing statutes. Indeed it may be said as a necessity that they *must* apply to the *future*; for at the time of the passage of those acts, it can hardly be said that a *married woman* had any legal estate that she could call her own, to which they could apply. Her personal estate, on her marriage, became her husband's absolutely. The rents and profits of her real estate, as we have seen, became his during coverture, and by the birth of a child he took a *vested* estate. These rights of the husband all came by the English common law adopted here; not one of them is either a natural or a moral right of the husband, or was ever conferred by any statute of this state; nor are they embraced in or conferred by the marriage contract. These estates of the husband, by the common law, were made incidents of the marriage contract. This contract and the subsequent birth of a child, were the *conditions* upon which these estates

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came into existence, but they all stood upon the foundations of positive law, and are no part of the marriage contract itself, (*Moore v. The Mayor of New York*, 4 *Selden* 114;) and they were all, therefore, within the power of the legislature to control and modify at their pleasure. (*Sleight v. Read*, 18 *Barb.* 159.) And even the contingency that the legislature might interfere and alter these rights, is one of the ingredients of the marriage contract. (*Id.*) To what extent then, have these unnatural rights been changed, and the natural rights of women restored? To what "property of married women" do these statutes apply? This was one of the leading questions on the argument. It appears to me that the plainest exercise of the faculty of common sense dictates the answer. It is the *property* referred to in the provisions of the same statute. It is the property which she held *absolutely* before marriage. It is *the property* which she may in like manner take by inheritance, gift, grant or devise, after marriage. It is the *property* which she may hold to her sole and *separate* use. It is *the property* which she *alone* has power to convey and devise. It is *the property*, real and personal, (without distinction made between them) and any interest or estate therein, and the rents, issues and profits thereof, *which she alone may convey and devise, in the same manner and with like effect*, as if she were unmarried. It is *the property* which shall not be subject to the disposal of her husband, nor be liable for his debts. This is the property of married women, most undoubtedly, that is referred to in the title. She may convey "*any interest therein*," says the statute. Could she do this if her husband had *curtesy* therein? Could she convey his *vested estate*? To entitle her to *convey* with the same effect as an unmarried female, must she not *hold* the same interest therein as if she was an unmarried female? Can she convey the *whole estate* with the same effect, if she does not *hold* the whole of it? If she *holds* the *whole estate*, where is his *curtesy*? It was not claimed on the argument that the statute intended to make any distinction in the tenure or man-

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ner of holding estates after marriage, between such property as was owned by a single female before her marriage, and such as was or should be inherited or acquired by a woman after marriage. I think it is fair to assume that no distinction was intended by the statute. In looking at the 1st section of the act of 1848, it is found that the property, real and personal, of a single female who may thereafter marry, "shall *continue her sole and separate property* as if she were a single female." What estate had she that should continue? Was it not the *whole* estate? These words furnish a key to the *intent* of this statute. Neither the word "*continue*," nor the words "*her sole and separate property*," in my judgment, can be tortured into a construction that takes from her any part, or that would give the husband a vested estate, or any estate therein. The learned counsel for the appellants, while they concede that though these statutes have wrought *some* change in the law, insist, still, that the right to curtesy is not thereby abrogated. But as I understand the argument, *this change* they do concede, that by these statutes, the wife during her life does possess the free and absolute power, independent of her husband, to devise or convey the real estate she had, or may acquire, *absolutely and in fee*, divested of any interest, present or future, that the husband has, or may have therein; and that the birth of a child during coverture, does not cut off or abridge this absolute right of the wife. This is conceding no more than the language of the statute in terms, demands; it is conceding no more than is held in *Hurd v. Case*, and *Clark v. Clark*, which are relied upon as authority. How then stands the estate of curtesy? Emasculated, as this concession *would make it*, it cannot stand alone for one moment. It cannot be an estate of curtesy, if wanting those qualities upon which alone it depends for its existence. This estate, (like other estates) must have a beginning. It must have a time to vest. If it has neither a beginning nor a time of vesting, how does it exist? If these statutes have *not abrogated or interfered with it*, it vests, as it ever did, upon the birth of

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issue, and begins in the lifetime of the wife. If they have interfered with it, when then does it vest or begin? There *must* be a *time* when it vests. Titles to estates are never in abeyance; the title is always in some body. (*Jackson v Catlin*, 2 *John* 248. 2 *Caines*, 61.) When then does it vest? Ever since the day of its feudal paternity, it vested at the birth of issue. These statutes have not attempted to change the time of its vesting.

The *initiate* estate of curtesy, in our own courts, has been held a sufficient estate to recover upon, in an action of ejectment. In *Jackson v. Johnson*, (5 *Cowen*, 95,) in an action of ejectment, decided in 1825, Sutherland, J., says: "It is clear that the birth of a child, at any time during the coverture, whether before or after the defendant's possession, would constitute Cooper tenant by the curtesy of all the lands of his wife, of which, during the coverture, she was so seised, as to support such an estate." In a later case in the court of chancery of this state, (*Ellsworth v. Cook*, 8 *Paige*, 643,) a married woman's real estate had been sold on a decree in partition, and a creditor's bill was filed, by a creditor of her husband, to reach the husband's interest in the fund, as tenant by the curtesy, and there was a question raised as to whether there had been such a *seizin* as to entitle to curtesy." Chancellor Walworth said: "I am satisfied that he had such a *seizin* in this case, of two-thirds of his wife's share of the premises, as to make him a *tenant by the curtesy initiate*, so as to entitle him to a *continuance* of his estate in those two-thirds during the whole period of his own life, in case he survived his wife." This case is of equal authority perhaps to that of any other. The time of the vesting of this estate, does not appear to me to be an open question. If the estate has not been abrogated, the time of vesting has not been changed. Our revised statutes have fixed the time of its vesting to be as we have claimed it. At the birth of issue, the husband is then, in the language of the statute, in a condition that the estate vests. (1 *R. S.* 723, § 13.) "An estate is vested when there is a person in

being who would have an immediate right to the possession upon the ceasing of the intermediate or precedent estate." The estate for his life then vests in the husband, and the remainder then and at the same moment vests in the heir; he can only have it consummate and absolute by the estate of the wife ceasing. The heir can only enjoy, by the ceasing of the estates of both. (*Sumner v. Patridge*, 2 Atk. 47.)

What kind of estate of curtesy then, would that be, that the wife at her will and pleasure, can convey, devise and destroy? If it is *vested* she cannot destroy it. In regard to this estate, perhaps no one question is better settled than this: that from the time of the *vesting* of the estate by marriage, seizin and the birth of issue, it becomes a right inseparable from the inheritance, that cannot be restrained, prevented or destroyed, by the act of the wife or of any other person, or by any proviso or condition. (*Greenl. Cruise, tit. Curtesy, p. 153, § 17, marginal paging 143. Paine's case, 8 Rep. 34. Mildmay's case, 6 id. 41.*) And Hilliard, an American writer of high reputation, on real estate, says: "that by the birth of issue, the husband gains an *initiate title*, which cannot afterwards be divested by act of God." (1 *Hill. on Real Estate, p. 79, § 22.*) As in dower, no act of the husband can divest his wife of her estate, after *marriage* and *seizin*, so in curtesy, no act of the wife could defeat curtesy after it becomes *vested* by *marriage, seizin* and *birth of issue*; nor did even adultery forfeit this estate as it did the estate of dower. I have searched the books in vain to find authority for an estate of curtesy, which depends on the volition or act of the wife. Such a quality is no part of the definition of an estate by the curtesy of England. If it now possesses such a quality, it is an estate by the curtesy of New York, and not of England; and its definition and character are yet to be made and written in the books. I think the conclusion irresistibly follows, that a statute which allows the wife to sell and convey perfect title to real estate, during coverture, after seizin and birth of issue, with *like effect as if she was unmarried*, has abro-

gated the estate of curtesy therein. Or if it shall be held that it has only been modified, it is so far modified that it has not the dignity of an estate even equal to that of a chattel real, and could not be levied upon or sold on execution. If it exists even in the modified, meager skeleton of its former self, which the argument concedes, its ghostly image seems incapable of description, and it has not essence enough left, "*per se*," to entitle it to respect, sufficient to make its proprietor a party to an action. I hold it to be nothing less than an absurdity to say that a statute that has destroyed the power of this estate to vest, has not also destroyed the estate. To sustain the position that this estate is not abrogated, it is absolutely necessary to establish, either first, that all the old law writers were mistaken in fixing the time of the vesting of the estate to be at the birth of issue; or second, that the acts of 1848 and 1849 have so far modified the common law as to change the time of its *vesting*; or thirdly, what is still more absurd, that the wife at her will and pleasure can alienate and destroy a vested estate that exists in the husband.

But still another insurmountable difficulty arises to the claimant of curtesy, since these statutes. To entitle him to this estate, he must have been *seised* of the estate "*jure uxoris*" during the life of his wife—not merely a seizin in law, but a seizin in deed; (*Co. Litt.* 29 a;) that is, *actual* possession as distinguished from the right to possession. Formerly, the actual seizin of the wife created a freehold estate in him, and he was thereby seised in her right, and when the estate of curtesy vested, he continued the inheritance by virtue of his seizin. Now any seizin by him during the life of the wife, is an impossibility. In the case of *Hearle v. Greenbank*, (3 *Atk.* 695,) Lord Hardwicke held that, because the husband had no seizin either in law or equity, *during the coverture*, he was therefore not entitled to curtesy. In *Bac. Abr. tit. Curtesy*, it is laid down, "the wife must have such an interest, that her husband may have seizin or possession in the nature of a seizin in *her right*. (*Hill. on Real Prop.* 76. 1 *Cruise*,

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108, § 10. 1 *Inst.* 29 a. 1 *How. U. S. Rep.* 54, 5. *Adair v. Lott*, 3 *Hill*, 182.)

There is but one other feature in this case that I design to notice by way of answer to the argument of the plaintiff's counsel. It is this; "that inasmuch as there are no words, in these statutes, of express exclusion of the husband's curtesy in terms, their rights remain precisely as they did at common law under an executory trust estate, created for the sole and separate use of the wife for life, without words of exclusion of the husband in the inheritance. That if the trust was *executed*, so that the inheritance *vested* in the wife, the husband had curtesy; and if the trust was *executory*, the title remaining in the trustees, to be conveyed to the heirs of her body at her death, then the husband had no curtesy." Such I concede was the common law, even here, prior to these statutes; and *Roberts v. Dixwell*, (*supra*.) proves this to be so; and the reason given for the decision in that case by Lord Hardwicke, I think is the same that should determine this question, to wit: *That during the coverture there was no seizin in the husband and wife.* And *Coke upon Littleton*, 30 a, was cited in that case to show that the husband must have some right in the lifetime of his wife, to entitle him to curtesy, because the estate of curtesy commences in her lifetime and *not at her death*; because, says Lord Hardwicke, citing with approbation the law as above, "My Lord Coke says, that to make a tenancy by the curtesy, there ought to be a right in the husband inchoate in the life of the wife." (1 *Atkyns*, 609.) These statutes execute their own purpose. Trustees are dispensed with, and husbands excluded. The machinery is simple, the intent clear.

From the influences of such considerations, I held before, and seeing no reason to change those views, I hold now, that our natural progress in knowledge and intelligence, our advanced social and political condition, our changed system of government, our better and more full appreciation of equal and natural rights of every class and condition of citizens,

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presented a reason, and I thought and still think, a *necessity*, for the passage of an act for the eradication of this unnatural and worse than useless tenure, called curtesy, as one of the vestiges of a bygone, military age, which had too long remained an excrescence upon our system of law, based as we claim it to be, upon the theory of an equality of natural rights. In my judgment, the provisions of these statutes, of 1848 and 1849, are aptly fitted, and were intended to effect, a radical change in relation to those tenures; that they introduced changes more suited to the necessities of the times, and to the present condition of parties; and that such a change was demanded by the highest considerations of public policy; was dictated by the soundest views of justice, and rested on a substantial basis of good sense.

In my former opinion I took the position that before the passage of these statutes, where it was the evident *intent* in making a settlement of an estate upon a married woman, that she was to hold it as a *feme sole*, the husband could not have curtesy; and I cited *Hearle v. Greenbank*, (3 Atk. 695,) to prove that proposition. Upon more examination, I hold that case to be undoubted law. It would be indeed a monstrous doctrine for the courts to publish to the world in this day, that this estate of curtesy possesses "*per se*" such a subtle, inveterate, yet mysterious tenacity of existence, that by no *intent* of parties, by no power of language that can be employed in deed or statute, can an estate be created free from its anomalous power; and yet the argument of the appellant's counsel verges upon this absurdity. In the most thorough review that I have been able to give to the cases of authority cited on this question, I have experienced no such embarrassment or difficulty as was insisted on, of a conflict of authority. Instead of finding the case of *Hearle v. Greenbank* overruled, or even doubted as authority, or that there existed any conflict of cases with it, upon the point for which it was used, (as was alleged,) I find it not only abundantly, but in every subsequent case, fully fortified and sustained. Neither Sir John

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Leach, as vice chancellor, in *Morgan v. Morgan*, (5 *Mad.* 249,) nor Chancellor Kent in his *Commentaries*, (vol. 4, p. 31,) raises a question of doubt, or gets up a conflict upon *that* point, as we shall presently see. Upon examination, also, the case of *Roberts v. Dixwell*, (1 *Atk.* 606,) instead of deciding the case “the other way,” as counsel insisted, on the argument, decides it exactly the same way. The supposed conflict of *cases*, was upon another question in the case, to wit; the question whether a husband was entitled to curtesy in a trust estate at all, and to a supposed distinction existing between an *executory* trust estate, and an *executed* trust estate. There was for a long time a doubt, and a struggle had been going on in the courts of equity upon that question. But upon the question of the effect of the testator’s *intent* thus to cut off curtesy, there was no conflict of opinion in the cases cited, and there has been no conflict since, that I am aware. Let us now first look at the case of *Roberts v. Dixwell*, (1 *Atk.* 607.) In that case Sir Thomas Sandys directed his trustees to convey a full fourth part of all his freehold lands, &c. to the use of his daughter Priscilla, for life, *and so as she alone*, or such person as she shall appoint, *take and receive the rents and profits thereof, and so as her husband is not* to intermeddle therewith,” and from and after her decease, in trust for the heirs of her body forever.” After discussing the difference between *executory* and *executed* trusts, Lord Hardwicke, upon the question of *intent*, came to this conclusion. He says, “It is plainly the *intention* of the testator that the husband should have no manner of benefit from the estate, either in the lifetime of the wife, or after her decease; *the husband of consequence is absolutely excluded.*” Here, it will be seen, the decision turned upon the question of *intention* of the testator. Now let us look at *Hearle v. Greenbank*. In that case the testator devised his real estate, and the rents, issues and profits thereof, “*to and for the sole and separate use of his daughter Mary*, wife of William Winsmore, during her life, *and at her disposal, and not to be subject to the power or control of her*

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said husband." Lord Hardwicke again held, in this case, "that neither in law or equity, was the husband tenant by the curtesy; to admit there was curtesy, would be directly contrary to the father's intention." Is there any thing to be reconciled between these two cases, upon this point? I confess I have seen nothing but harmony in this particular. The learned counsel who insisted upon the argument, that *Roberts v. Dixwell* had been decided exactly the other way from *Hearle v. Greenbank*, had probably not read the case itself, but had most probably read the remark from Chancellor Kent, referring, not to *that*, but to an entirely different question, arising in the case, to wit, the question whether curtesy existed in an *executory* trust. The case of *Morgan v. Morgan*, (5 *Mad.* 249,) cited as overruling *Hearle v. Greenbank*, upon examination, is found not at all in conflict with it. In that case there were no words of express *exclusion* of the husband in the trust. Had it even been found in conflict, the opinion of Vice Chancellor Sir John Leach would hardly be regarded as authority, when coming in conflict with that of Lord Hardwicke, chancellor. But the case actually sustains, instead of being in conflict with *Hearle v. Greenbank*. In that case, Sir John Leach admits that he would have acted according to the *intention* of the settlement, but the intention not being *expressed*, he decides the case upon the ground that the husband was not *wholly excluded* by the terms of the settlement. And he further admits that a husband would be *wholly excluded* from curtesy, by a provision that the *inheritance* shall descend to the heirs upon the death of the wife. It is therefore an authority sustaining *Hearle v. Greenbank*. His dictum in that case, that *Hearle v. Greenbank* and *Roberts v. Dixwell* could not be reconciled, did not, as will be thus seen, at all refer to the question of *curtesy*, when the *intent* to exclude it was manifest, but only to the general principle, that a husband would have curtesy in the *equitable* as well as *legal* inheritance of the wife, even though the rents and profits during her life were directed to be paid to her. The case of *Bennett v.*

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Davis, (2 P. Wms. 316,) has never been doubted as authority, that I am aware of; but on the contrary, it is cited with approbation in all the above cases, and especially by Chancellor Kent in his discussion of this question, which the counsel erroneously cited as authority the other way. I regard this case as conclusive upon the point. This is the statement of the case: J. S. married his daughter to one Bennett, a tradesman in London, who was an extravagant spendthrift, and in debt. The father made a will, and devised his land in fee to his daughter (the wife of Bennett) *for her separate and peculiar use, exclusive of her husband, to hold the same to her and to her heirs, and that her husband should not be tenant by the curtesy.* The father died, the husband became bankrupt, the commissioners of bankruptcy claimed to take the estate from the wife and children, to pay the husband's debts out of his estate of *curtesy* therein. It was argued in that case, as in this, that *as matter of law*, the husband had *curtesy in his wife's estate, notwithstanding her father's intent*; and that the settlement so made by the father was repugnant to law. The court thought otherwise, and held that there was no difference between an estate created by the *act* of the *party*, and one *created by act of law*, and that the intention of the testator should control. •

In my former opinion, I placed my decision substantially upon the ground that the *intent* of a remedial statute, in relation to the estates of married women, should be construed in the same manner as the *intent* of a devise, marriage settlement, or trust estate, created for the same purpose, if the language was either identical, or the same in substance; and that the manifest *intent* in both, should be the criterion to determine. The cases above cited, it will be seen, fully sustain that position. These cases could be multiplied if necessary; let one other suffice, which contains the substance of all. In *Stanton v. Hale*, (2 Russ. & Mylne, 175,) Lord Chancellor Brougham said: "It was clear that no particular form of words was necessary, in order to vest property in a married woman, to her

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separate use; that *intention*, though not expressed in terms, might still be inferred from the nature of the provisions annexed to the gift; as where, for example, the direction was that the property should be *at the wife's own disposal*, or that her receipts should be a good discharge, circumstances which raised a manifest implication, *that the marital right was meant to be excluded*." Whether we look at the uninterrupted chain of adjudications by the courts, upon deeds, settlements, and agreements for that purpose, or upon the like language in a statute creating the estate, the *intent* is the controlling feature that is to determine its meaning. Indeed the legislature, as if jealous that the courts might depart from this just rule, that *intent* should govern construction, have incorporated it as a permanent provision in the statute, (1 R. S. 748,) as follows: "In the construction of every instrument creating or conveying, or authorizing the creation or conveyance of an estate or interest in lands, it shall be the duty of courts of justice to carry into effect the *intent* of the parties, so far as such *intent* can be collected from the whole instrument, and is consistent with rules of law." If then such or equivalent words are used in a statute conferring estates upon married women, must not the same *intent* be held to follow as in the language of an agreement? If the words used in this statute had been found in any devise, or marriage settlement, that has ever been before a court of equity since the days of Hardwicke and Eldon, it would have been adjudged sufficient to confer not only a separate estate, for the sole and separate use of the beneficiary, but also one that would exclude curtesy. Not only are there negative words enough contained in it, to exclude every idea of there being the rights of others covertly remaining within its meaning, but there is also the positive power, incident to all absolute estates, the "*jus disponendi*." "Property," says Lord Thurlow, in *Fettiplace v. George*, (1 Ves. jun. 49,) "the moment it can be enjoyed, must be enjoyed with all its incidents." It is a rule of common law, that the power of alienation is an inseparable incident to the right

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of property, for the common law knows no such anomaly as a right of property without the absolute and universal power of disposal. (*Bell on Husband and Wife*, 504.) When married women are allowed to enjoy property independently of their husbands, the privilege necessarily implies a "*jus disponendi*." (*McQueen on Husband and Wife*, 294.)

Still another argument against this view of the statute has been most strenuously insisted on, upon the argument; that is, if it had been the intent of the legislature to have changed or abrogated the common law, or to have cut off the husband's curtesy, they would have so declared in terms, in the statute itself. Such an argument has its force, and is to be duly weighed. It has less force, however, when applied to a *remedial* statute, than it might to some others. But this argument, when applied to this statute, proves far too much; for in the very argument submitted, the learned counsel admit that it has abrogated a part of the common law in relation to this same estate, to wit: that the incidents of enjoyment and alienability, during the life of the wife at least, are entirely cut off, and yet did not say so in terms. But the courts have already gone far beyond this concession of the counsel, and we are not at liberty to overrule it. In *Blood v. Humphrey*, (17 Barb. 662,) the general term of the 6th district have held that those statutes of 1848 and 1849, have not only repealed so much of the revised statutes as require a married woman in making an acknowledgment of a deed to be examined separately, if the deed relates to estates acquired since that law, but they also held that they have abrogated much of the prior common law in regard to *their rights*. Mason, J. says: "The legislature *intended* to remove the entire disability, which both the common law and the statute had thrown around married women, not only as regards their right to take and hold, free and independent of their husbands, but also to remove the obstacles which the law had interposed against their conveying both by grant and devise, and to place them, so far as the lands which they hold in

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their own right are concerned, on the *same basis precisely as unmarried females.*" This, it seems to me, is a full answer to this last position of the plaintiff's counsel, and it also appears to me to contain a pretty satisfactory answer to the whole argument.

If, then, the position is sound, that the *intent* of a remedial statute for a given purpose, and the *intent* of a devise or agreement to effect the same purpose are alike controlling in giving them construction, and if identical or equivalent language is to be held to mean the same thing in each, then these statutes which assimilate these two estates of equity and of law, and establish thereupon one uniform and equal basis, exempt from the technical embarrassments which have so long been tolerated from veneration of ancient forms and precedents, should receive from the court such construction as shall give full effect and operation to their provisions, and so that their design and object be not evaded, and when superadded to this, the statutes are found to establish benevolent provisions, such as are consistent with the demands of an enlightened and progressive age, in harmony with the long continued efforts of the courts to mitigate in some degree the inequalities and injustice of the common law in relation to married women and their immediate heirs, and to prevent the squandering of their estates by improvident husbands, it should be the willing duty of the courts to sustain and give efficiency to their just and equitable provisions. They should enter upon the duty of its construction, with the same remedial spirit in which the legislature entered upon their duty of enacting the law, by discarding all the unnatural maxims and precedents and clogs to progress. Thus sustaining its letter and intent, it will become a kind of magna charta, in the restoration of natural rights, too long and too unreasonably withheld.

Having come to the conclusions above expressed, after a careful consideration of the arguments presented, and the authorities to which I have had access, I have been unable

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to change the conclusions at which I before arrived. I cannot hold that a *remedial* statute, whose letter and title declare its design to be, protection of the estates of *married women*, shall by construction, not warranted by its language, be made to protect their *husbands*, and to give to the latter an estate which all elementary writers declare that they have neither a natural, nor a moral right to hold.

The order of the special term should be affirmed.

ROSEKRANS, J., dissented.

Order affirmed.

[SARATOGA SPECIAL TERM, January 19, 1858. *Potter*, Justice; and SCHENECTADY GENERAL TERM, January 4, 1859. *C. L. Allen, James, Rosekrans and Potter*, Justices.]

 DE WITT C. HAY vs. ROBERT HALL.

A complaint alleged that the defendant, being desirous of purchasing flour, for shipment abroad, but not being able to make such purchases in his own name, he applied to C. for leave to make purchases in C.'s name; and that it was agreed between them that the defendant might make such purchases in the name and upon the responsibility of C., and that he should pay to C. the amount thereof, *so as* to save C. harmless by reason of such purchases. That the defendant accordingly bought, in C.'s name, flour to the amount of \$86,939.20; all of which the defendant received and shipped in his own name, and had the benefit of, and for which he promised to pay C. That \$3500 remained unpaid to C. That C. had assigned his claim to H., who had assigned the same to the plaintiff. *Held*, on demurrer, that the action was not upon an agreement to *save C. harmless*; but that the legal effect of the arrangement was that C. bought the flour, by the defendant as his agent, and let the defendant have the same, who paid C. for it, with the exception of \$3500.

Held also, that it was not necessary for the plaintiff to allege that C. had paid for the flour, or had sustained any other damage than the non-payment of the \$3500 by the defendant. Demurrer overruled.

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APPEAL from an order entered at a special term, overruling a demurrer to the complaint. The complaint alleged that at the city of New York, in or about the month of November, 1856, the defendant being desirous of purchasing flour for shipment abroad, but not being able to make such purchases in his own name, applied to one Angus Cameron for leave to make purchases in his, Cameron's, name, and it was thereupon agreed by and between said Cameron and the defendant, that the defendant might make such purchases in the name and upon the responsibility of said Cameron, and that he should pay to said Cameron the amount thereof so as to save the said Cameron harmless by reason of such purchases. That in pursuance of such arrangement the defendant, between the 15th November, 1856, and the 14th January, 1857, bought in said Cameron's name and upon his said Cameron's responsibility, flour to the amount of \$86,939.20, all of which the defendant received and shipped in his own name and had himself the benefit of, and for which the defendant promised to pay said Cameron; that the defendant made payments to said Cameron, on account of said flour, to a large amount, but left unpaid to said Cameron, on the first day of May, 1857, a balance of over \$3500. The plaintiff further alleged, that on the 1st day of May, 1857, the said Angus Cameron duly assigned, transferred and set over the said claim against the defendant to one Frank Hay, who afterwards, and before the commencement of this action, duly assigned the same to the plaintiff, who is now the lawful owner and holder thereof. That the said claim had not been paid, or any part thereof, although the defendant had often been requested to pay the same, but had hitherto wholly neglected and refused to pay the said balance, and the same remains wholly due and unpaid to the plaintiff. The plaintiff claims judgment against the defendant for the sum of \$3500, and interest thereon from the 1st day of May, 1857, besides costs.

The defendant, by his demurrer, alleged the following grounds of objection to the complaint: 1. That the complaint

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did not state facts sufficient to constitute a cause of action. 2. That it did not allege that Cameron had paid for the flour alleged to have been purchased in his name by the defendant. 3. That it did not allege any damage to Cameron by reason of the defendant's acts or omissions. 4. That it did not allege that said flour had not been paid for to the persons from whom it was purchased. 5. That the complaint did not allege notice to the defendant of the assignment from Cameron to Hay. 6. That it did not allege non-payment of the claim by the defendant to Cameron. 7. That it did not allege notice of the assignment from Frank Hay to De Witt C. Hay. 8. That it did not allege non-payment to Frank Hay. 9. That it did not allege any damage sustained by Cameron in consequence of the alleged breach thereof before the assignment to Hay. 10. Because no action can be sustained by an assignee upon an agreement to save harmless, unless damage has actually accrued from the breach thereof to the assignor thereof, before the assignment. 11. Because any claim which Cameron had against the defendant was not assignable.

The demurrer was argued at a special term, before Justice CLERKE, who assigned the following reasons for his judgment.

"It is a mistake to term the agreement set forth in the complaint an agreement to *save harmless*. The complaint shows, although with unnecessary particularity, and with superfluous allegations, that the defendant, with Cameron's permission, purchased flour in Cameron's name and on Cameron's responsibility. On this purchase Cameron, therefore, became the owner of the flour; consenting to let the defendant receive it and enjoy the benefit of it—the complaint expressly stating that the latter expressly promised to pay Cameron for it—which, it alleges, he has failed to do. It was not therefore necessary to allege actual payment by Cameron to the persons from whom the flour was purchased in his name, or to make any of the other allegations insisted on by the demurrer.

Demurrer overruled, with costs: with liberty to the defendant to answer within ten days, on payment of costs."

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The defendants appealed from this order to the general term.

S. P. Nash, for the plaintiff.

Ph. S. Cooke, for the defendant.

By the Court, SUTHERLAND, J. Contrary to my first impression, I think the judgment rendered at the special term, overruling the defendant's demurrer in this case, was correct and should be affirmed. The counsel for the defendant is mistaken in supposing that the action is on an *agreement to save harmless*. It is true, the complaint alleges that the defendant agreed to pay to Cameron, (the assignor of Frank Hay, the immediate assignor of the plaintiff,) the amount he would be liable to pay for the flour (from its purchase in his name and with his consent, and on his responsibility) to save Cameron harmless; but this is a mere allegation of the *object* or *purpose* of the agreement, probably unnecessarily made, and not of the legal effect of the agreement as stated in the complaint. The complaint alleges that the defendant being desirous of purchasing flour for shipment abroad, but not being able to make such purchases in his own name, applied to Cameron for leave to make purchases in his, Cameron's, name; and that it was agreed by and between Cameron and the defendant, that the defendant might make such purchases in the name and upon the responsibility of the said Cameron; and that he should pay to Cameron the amount thereof, *so as* to save the said Cameron harmless by reason of such purchases. That in pursuance of such arrangement the defendant, in November, 1856, and January, 1857, bought in said Cameron's name flour to the amount of \$86,939.20, all of which the defendant received and shipped in his own name, and had the benefit of, and for which he promised to pay Cameron; that the defendant had made payments to Cameron for a large amount, but left unpaid on the 1st day of May, 1857, \$3500.

Now the legal effect of all this is, that Cameron bought the

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flour by the defendant as his agent, and let the defendant have the flour, who paid Cameron for it, with the exception of \$3500; and the complaint alleges that Cameron's claim for that balance had been assigned by Cameron to Frank Hay, and by the latter to the plaintiff. The defendant is not liable to the party or parties of whom the flour was bought, and it is of no consequence to him whether Cameron has or has not paid for the flour. Supposing Cameron had not paid for the flour, that is no reason why the defendant should not do as he agreed, and pay Cameron, as the defendant had the flour.

It was not necessary for the plaintiff to allege that Cameron had paid for the flour, or had sustained any other damage than the non-payment of the \$3500 by the defendant. Nor is it necessary, in my opinion, in aid of the plaintiff's complaint, to invoke the principle of the cases of *Thomas v. Allen*, (1 *Hill*, 145,) and *Churchill v. Hunt*, (3 *Denio*, 323.)

If the defendant has paid either the original sellers and holders of the flour, or Cameron, before or since the assignment without notice, that is matter of defense.

The judgment given at the special term must be affirmed, with costs.

[NEW YORK GENERAL TERM, September 20, 1858. *Davies, Hogeboom and Sutherland*, Justices.]

ADAMS and others vs. BISSELL & NOBLE.

Consignees of goods and holders of the bill of lading, who have made advances upon it, have an interest or property in the goods, which will entitle them to bring an action against the carrier, for the loss, waste or wrongful conversion thereof.

Such a cause of action may be joined with a claim to recover back a sum overpaid by the plaintiffs to the defendants, on account of the freight of the goods.

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APPEAL by the defendants, from an order made at a special term.

Edwards & Man, for the plaintiffs.

William Fullerton, for the defendants.

By the Court, SUTHERLAND, J. This is an appeal from an order made at special term, overruling the defendants' demurrer to the plaintiffs' complaint.

The complaint purports to state two causes of action separately. After alleging that the defendants, in November, 1855, were copartners, doing business as common carriers on the Erie canal and Hudson river, under the firm name of John Bissell & Co., the complaint substantially alleges as the first cause of action, that the defendants received from one F. W. Patterson, at Buffalo, three thousand bushels of wheat, to be conveyed by them to the city of New York, for account of one H. B. Smith, to the care of the plaintiffs, under the firm name of Adams & Buckinghams, and that the defendants on receiving the wheat, made and delivered a bill of lading therefor to Patterson, whereby they certified and acknowledged that they had received that quantity of wheat to be delivered in the city of New York, for account of the said H. B. Smith, to the care of the plaintiffs; that the plaintiffs were commission merchants doing business in the city of New York, and that the wheat was consigned to them for sale; that about the first day of December, 1855, the plaintiffs as such consignees were the owners and holders of the bill of lading, and at or about that time made large advances on the wheat; that the canal boat upon which the wheat was shipped arrived in the city of New York on or about the 20th of May, 1856, and so much of the wheat as she then had on board was discharged; that the wheat proved to be deficient in quantity to the extent of over three hundred and forty bushels, and that the plaintiffs are informed and believe that the defendants,

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their agents or servants, *lost*, wasted or wrongfully converted to their own use the three hundred and forty bushels and over of the wheat ; that the defendants have never paid or accounted for the 340 bushels of wheat, although often requested so to do ; that at the time of the loss, wasting or conversion of the wheat, the plaintiffs were the owners of the same and entitled to the possession of the same, and have ever since been entitled to the value of the same, and that the value was \$680.

The complaint alleges as the second cause of action, that when the canal boat arrived at New York, the plaintiffs, not knowing the extent of the deficiency in quantity of the wheat, paid the freight and charges upon the whole 3000 bushels, to the defendants, thereby overpaying them to the amount of \$170.

The plaintiffs claim to recover the value of the 340 bushels of wheat, and damages for the conversion of the same, and the amount of the over-payment on account of freight, with interest on the same.

The defendants formally state three causes of demurrer to this complaint ; but they appear to amount only to these two : *First*, that the facts stated as constituting the first supposed cause of action, do not constitute one ; *Second*, that a cause of action for a tort is improperly joined with a cause of action arising on contract.

The demurrer appears to concede that sufficient facts are stated to constitute the second cause of action. The demurrer, on the ground of insufficiency, appears to be taken only to the first cause of action.

It is probable the plaintiffs could not have maintained an action on the bill of lading as a contract, for the non-delivery of the 340 bushels of wheat ; for the contract was not made with them ; and the mere possession of the bill of lading as consignees, would not have enabled them to bring an action on it as assignees. And this is not the theory of the plaintiffs' complaint. The shipment of the wheat, the execution and delivery of the bill of lading, and the advance made by the

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plaintiffs on it as consignees, are alleged, to show that the plaintiffs were the owners of the 340 bushels of wheat when it was lost, wasted or wrongfully converted to their own use by the defendants. The first cause of action is for a tort, a wrongful conversion, and the facts as to the shipment of the wheat to the plaintiffs, their possession of the bill of lading, and their advance on it are alleged to show that the plaintiffs had such a vested interest in the wheat at the time of the wrongful conversion, that as owners they were entitled to bring the action for the wrongful conversion, and recover the value of the 340 bushels of wheat, with damages, &c.

The charge of the wrongful act, the loss, waste, &c., is certainly very indefinitely made, but that is not reached by the defendants' demurrer. It would have been better for the plaintiffs to have stated the amount advanced by them as consignees; but indefinite as the complaint is in this and in some other respects, I think the facts alleged are sufficient to show that the plaintiffs as consignees and holders of the bill of lading, who had made large advances on it, had an interest or property in the wheat at the time of its loss, waste or wrongful conversion, that gave them a right to bring the action. The authorities appear to be quite clear and conclusive. (*Smith v. James*, 7 Cowen, 328. *Holbrook and others v. Wright*, 24 Wend. 168.)

When there is an agreement between the consignor and consignee that the consignee shall make advances on the credit of the goods consigned, and dispose of them on commission for his reimbursement, the consignee acquires a vested interest in the goods. It would appear that such an agreement might be inferred, between the consignor and consignee, from the facts stated in the complaint in this case. (*Grosvenor v. Philips*, 2 Hill, 147.) I think, therefore, the first ground of demurrer—that of insufficiency—was not well taken.

The second ground of demurrer—that there is a misjoinder of actions—presents more difficulties. It must be admitted that the first cause of action is for a tort, and that the second

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on an implied assumpsit, to pay back money paid by the plaintiffs, under a mistake of facts. But the counsel for the plaintiffs insists that both causes of action arise out of the same subject of action, namely, the transportation of the wheat from Buffalo to New York, or arise out of transactions connected with that subject of the actions, and are therefore joined under the 1st subdivision of § 167 of the code.

Cases throw but little light on the unmeaning generality of the 1st subdivision of this section of the code, which is that the plaintiff may unite several causes of action legal or equitable, or both, where they all arise out of "the same transaction, or transactions connected with the same subject of the action." Now I do not think the transportation of the wheat to New York, is the subject of the plaintiffs' action. The plaintiffs have two causes of action; the subject of the first would appear to be the loss, waste or wrongful conversion of the 340 bushels of wheat by the defendants, their wrongful neglect or act by which the plaintiffs lost their property; the subject of the second cause of action would appear to be the \$170 of the plaintiffs' money which the plaintiffs overpaid the defendants on account of freight, and which the defendants ought to have paid back to the plaintiffs. But have both these causes of action or subjects of action, arisen out of the same transaction; or are they both connected with the same transaction, within the meaning of this provision of the code? I do not want to nullify the code, and I have no right to nullify it; and this provision has, or was intended to have some meaning. Why then should I not say that the transaction in this case, out of which has arisen the plaintiffs' two causes of action and subjects of action, commenced with the shipment of the wheat at Buffalo, and has not ended yet, even by the commencement of this action; the plaintiffs' two causes of action being links of the chain of facts constituting the transaction, and thus arising out of or connected with the same transaction. By the "subject of action," in this section of the code, must be intended not the subjects of the different

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courts or of the several causes of action, but of the action as a unit. To say that by the "*subject of action*" is meant the several causes of action, nullifies this provision of the code. To give force and effect to it, it appears to me you must say that it means that the plaintiff can unite several causes of action against the same party, arising out of the same transaction, and nothing more; and you must treat the concluding words, "*or transactions connected with the subject of the action,*" as useless or unmeaning surplusage.

Upon the whole I have come to the conclusion that the plaintiffs had a right to unite the two causes of action in this complaint; but I have done so knowing that no reasoning on this point can have much logical precision or lead to a satisfactory result.

The judgment of the special term, overruling the demurrer, should be affirmed with costs.

[NEW YORK GENERAL TERM, September 20, 1858. *Davies, Hogeboom and Sutherland*, Justices.]

 BLACK vs. W. M. FOSTER and D. C. FOSTER.

Where testimony is offered which is relevant as to one of two defendants but is irrelevant as to the other, it must be objected to by the latter on that ground. If an exception is taken by both defendants, it is not erroneous to overrule it.

Where, in an action to recover the possession of personal property, the defendants appear and answer, and claim a redelivery of the property to them, and give an undertaking under the 211th section of the code, in which it is stated that they require a return to them of the property taken, such undertaking is competent testimony to go to the jury to disprove an allegation in their answer that they do not detain the property described in the complaint. It is for the jury to say how much weight such an undertaking is entitled to, and how far it goes to establish the point that the defendants claim to detain the plaintiff's property.

THE plaintiff sold to the defendant William M. Foster, in August, 1854, a quantity of lumber, on the terms cash for

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freight and his note for four months for the amount of the bill of lumber. The lumber was placed on a wharf in the city of New York and measured, and the bill presented at the defendant W. M. Foster's office, and the terms of sale not being complied with, the property was demanded of him and he refused to deliver it, stating that he had made an assignment and had put every dollar in it. To a threat to take the property away, he replied that it could not be taken away, as it was put into his assignment. This was on the 28th of August. The assignment was dated and executed on the 11th of Sept. 1854, and was made by Wm. M. Foster to the other defendant and another person, and was signed by both defendants, and its execution acknowledged on the same day. The property was taken by the sheriff, and the defendants claimed a re-delivery to them, and caused an undertaking to be executed according to the code, which stated that they required a return to them of the property taken. This undertaking was executed and acknowledged about the time the defendants' answer was put in.

The jury found a verdict for the plaintiff, and a judgment was thereupon entered; from which judgment an appeal was taken.

D. D. Lord, for the plaintiff.

M. Cornwall, for the defendants.

By the Court, DAVIES, P. J. Several exceptions were taken to the rulings of the justice at the circuit, and those rulings, if erroneous, will entitle the defendants to a new trial.

The first exception taken is to the admission of the declaration of Wm. M. Foster, when called upon to comply with the terms of the sale. This testimony was objected to by the defendants, and not by the defendant H. C. Foster as irrelevant as to him. It was clearly competent as to Wm. M. Foster, and if the defendant D. C. Foster wished to object to it as

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incompetent as to him, he should have so stated the ground of his objection. It was not incompetent, irrelevant or improper as to the defendant Wm. M. Foster, and was therefore properly admitted.

The next exception was to the admission of the assignment executed by both defendants. We are unable to see any error in this. It was the act of both, and contained their joint declaration, and was competent testimony as to both.

The next exception was to the admission of the undertaking put in in this cause, on the return of the property to the defendants. This undertaking was given in the cause, as an act or proceeding therein, under section 211 of the code, which provides that at any time before delivery of the property to the plaintiff, the defendant may require a return thereof upon giving the undertaking prescribed, and on such undertaking being given he is entitled to a return. Both of the defendants in this cause appeared and answered, and by giving this undertaking both claimed a return of the property. It was an act or proceeding in the cause by both defendants, and as such was competent testimony to go to the jury, to disprove the allegation of their answer, that they did not detain the property described in the complaint. It was for the jury to say how much weight it was entitled to, and how far it went to establish the point that both defendants claimed to detain the plaintiff's property. We think the justice properly refused to dismiss the complaint as to the defendant D. C. Foster. There was certainly some evidence to show that he claimed with the other defendant to retain the plaintiff's property, and the jury by their verdict have found that he did so detain it. We think there was evidence to sustain such finding, and that we ought not to disturb their verdict. We see no error in the charge of the justice, or in the refusal to charge as requested. The judgment appealed from must therefore be affirmed, with costs.

MOBLEY *vs.* CLARK and others.

B., the agent of a corporation, drew a draft upon the company at New York, in favor of M. for the amount of a protested draft previously drawn by such agent, in M.'s favor and then held by him. Both the drawer and the drawee were insolvent at the time the draft was drawn, and were known to M. to be so. In drawing the draft, B. acted only as the agent of the company, had no funds in the hands of the drawees, and had no reason to believe that he had any. M. sent the draft to the defendants, a banking house at New York, for collection. It was duly presented for acceptance, and was accepted, but was not presented and protested for non-payment. *Held* that the defendants were not bound to present the draft and demand payment, and were not liable to M. for their neglect to do so.

Where the drawer of a bill has no funds in the hands of the drawee, applicable to the payment of the bill, a presentment of the bill for payment, and protest and notice, are not necessary to charge the drawer.

APPEAL from a judgment entered at a special term, after a trial at the circuit. Mobley, the plaintiff in this cause, holding a protested draft of the Mississippi Mining and Manufacturing Company, drawn at Mineral Point, Wisconsin, by the agent there of the company, upon the company in the city of New York, for about the sum of \$1300, made an arrangement with the agent in Wisconsin, by which the agent was to draw another draft on the company in New York for the same amount. This was done under the expectation that the new draft would be paid, as it was supposed that the company was coming up. Accordingly, Bellows, the agent of the company, on the 21st June, 1834, drew a draft for the amount of the protested draft, (\$1359.74,) upon the company in New York, at thirty days after date, to the order of the plaintiff. The draft was sent to the defendants, a banking house in the city of New York, for collection, and was duly presented for acceptance and was accepted, but was not presented and protested for non-payment, whereby the plaintiff alleged that the drawee was discharged, and he claimed to recover from the defendants the amount of the draft by reason of the negligence. The testimony warranted the assumption that both drawer and drawee were insolvent at the time the draft was drawn, and

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known to be so to the plaintiff. That the drawee in drawing the draft acted only as the agent of the company, and that he had no funds in the hands of the drawees to pay the draft, and had no expectation or belief that he had such funds.

On the trial the defendants, upon the evidence adduced, moved to dismiss the complaint, which motion was granted by the judge at the circuit; to whose decision the plaintiff excepted.

J. S. L. Cummins, for the plaintiff.

J. E. Burrill, for the defendants.

By the Court, DAVIES, P. J. It is difficult to perceive upon what ground the plaintiff can recover in this case. This draft was given as a convenient method to obtain payment of an existing debt of this corporation. The plaintiff parted with nothing on the faith of it, and is in the same position now, as he was before he received it. That a draft drawn under such circumstances, and for such a purpose, need not be presented for payment and demand made, is settled by the court of appeals in *Fairchild v. Ogdensburgh Rail Road Co.*, (15 N. Y. Rep. 337.) Denio, C. J., there says: "The paper which it is alleged was given for this indebtedness was not a bill of exchange. The idea of a bill, under the law merchant, supposes the existence of a party other than the drawee to whom the bill is addressed, and who is therein requested to pay the amount to the holder on account of the drawer. Here the party with whom the plaintiff dealt was the corporation, which being an artificial person, could only act by agents. * * * * Both the drawee of the order and the party to whom it was addressed, represented the corporation, and neither incurred or were expected to incur any personal obligation. The default of either, in performing any duty respecting the order, would be the default of the corporation, and would not subject either of them to any individual liability. * * * To require from

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the holder of such a draft the kind of diligence which the law exacts of the holder of commercial paper, would be a perversion of its object." This authority, and the conclusiveness of this reasoning, dispose of the present case. It meets it at all points, and there is no escape from its binding character.

But it was urged by the plaintiff's counsel on the argument, that Bellows, the drawer of the draft, had made himself liable individually upon the draft, and that therefore the plaintiff was entitled to enforce that liability; which right he had been deprived of by the neglect of the defendants.

There are several answers to this position.

1. If the court of appeals are correct in the case cited, (*supra*,) the drawer of this draft never was liable individually, nor could he be made liable by protest and notice to pay it.

2. The drawer himself testifies that he should never have defended on that ground, and that he never objected to payment by him upon that ground.

3. It conclusively appears that the drawer had no funds in the hands of the drawee applicable to the payment of this draft, and that he had no reasonable expectation that he would have funds for that purpose. To charge the drawee of a bill in such a case, a presentment of the bill for payment, and protest and notice, are not necessary. (*Edwards on Bills*, 490, and cases cited.) If Bellows, the drawer of this draft, was individually liable to the plaintiff to pay the same, he has not been discharged from such liability by any act of the defendants, or any omission on their part.

We think the motion to dismiss the complaint was properly granted, and that the judgment appealed from should be affirmed with costs.

[NEW YORK GENERAL TERM, September 20, 1858. *Davies, Hogeboom and Sutherland*, Justices.]

Dows, survivor &c., *vs.* DENNISTOUN and others.

REEVE *vs.* THE SAME.

Where goods are purchased for cash on delivery, that is, the price to be paid within ten days, the very terms and import of the arrangement are that there is to be a qualified delivery, which is to precede payment.

An understanding, arrangement or custom that the possession of the goods shall be intrusted to the vendee for the purpose of enabling him to realize upon them, and thus provide the means for the payment of the price, cannot be construed into an absolute transfer of the title to the property, as between the original parties to it, or persons having no greater equities than the original parties.

And if, under such circumstances, the goods are delivered to the purchaser, on board a vessel, and he receives a bill of lading therefor, which, together with a bill of exchange drawn upon it, he transfers to third persons, before he has himself paid for the goods, upon an agreement that such third persons shall pay the amount of the bills within ten days, the latter cannot, as against the original vendors, set off against the bills the amount of debts owing to them by the purchaser.

The case of *Fleeman v. McKean*, (25 Barb. 474,) approved.

ON the 13th May, 1851, one Edward B. Cooper purchased of Dows & Cary, a firm consisting of the plaintiff David Dows and one John B. Cary, since deceased, 500 barrels of flour for cash, and the vendor by his direction sent the flour on board the ship *Conqueror*, it being understood that Cooper was sending the same to Liverpool for sale. The flour was so put on board the ship, and Cooper received the bill of lading therefor. It was proved, and the referee found as facts, that the purchase was for cash, by which the parties intended and meant payment at about ten days after the purchase, according to a custom in that trade to that effect. That on the 19th of May Cooper sold the bill of lading, and a bill of exchange drawn upon it, to the defendants, upon the understanding that the same was to be paid for on the 21st of May. On that day Cooper called on the defendants for the price or proceeds of the bill, and they declined to pay him the same, on the ground that they had that morning received advices of the dishonor of two previous bills purchased by them from and drawn

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by Cooper, and they claimed to hold such price or purchase money to meet those bills, and the amount of another bill which they had purchased of Cooper, and which was dishonored in London on the 13th of May, and notice of which dishonor the defendants received on the 28th of May. The defendants were advised of Cooper's failure on the morning of the 21st of May. The referee found that the defendants were entitled to retain the avails of said bills of exchange and bills of lading, and apply the same to the indebtedness of Cooper to them. Upon his report judgment was entered for the defendants and the complaint dismissed with costs; and from that judgment the plaintiffs appealed.

The facts in the second case were similar. The action related to a quantity of butter purchased by Cooper of the plaintiffs therein, under similar circumstances, and the bill of lading therefor and the bill of exchange thereon were sold to the defendants under the same circumstances, and the proceeds claimed by them to be held for the same purpose and for the same reason. In this case a like report was made, a like judgment entered thereon, and a like appeal.

C. Van Santvoord, for the plaintiff Dows. I. By the letter of Cooper to the plaintiff's firm, dated May 23d, 1851, the sale to Cooper was rescinded, and the plaintiff's firm of Dows & Cary were reinstated as owners of the flour; and the firm were thereby invested with all the rights of Cooper to the flour, in addition to all the equities and rights which belonged to them as unpaid vendors, under the circumstances of the case. (*Cross on Lien*, 361, 371. *Ash v. Putnam*, 1 *Hill*, 302.)

II. That a bona fide purchaser for value, without notice, would have acquired a good title by a sale and delivery of the flour from Cooper, by reason of the fact that the shipment of the flour and receiving the bill of lading therefor by Cooper, were with the consent of the plaintiff's firm, is not controverted by the plaintiff. Neither fraud nor unperformed con-

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ditions of the sale to Cooper, would affect the title of a bona fide purchaser from him. (*Smith v. Lyn s*, 1 *Selden*, 41.)

III. But the plaintiff insists that the fact that the sale to Cooper was for cash, that the delivery in advance of payment, was in compliance with the usage of the plaintiff's trade, in such sales, that it was made in expectation of payment in cash, within the time required by such usage, in connection with the evidence, showing that the sale was made for shipment, the evidence, as to the standing and credit of Cooper, and the representations on which the sale was made, exclude the idea that the flour was delivered to Cooper, relying for payment upon the personal security or ability of Cooper and his readiness to pay, and negative the conclusion that the delivery of the flour was intended to pass the title absolutely to him, without payment, or that he was permitted to ship the flour and take the bill of lading therefor, except upon the condition or in trust for a special purpose, viz: that he should use the possession or bill of lading to raise money to pay for the flour, from bankers, by pledge of the bill of lading, or in some other way, and should apply the money so raised in payment for the flour. And that under the circumstances, the lien of the plaintiff's firm of Dows & Cary, for the purchase money of the flour sold to Cooper, was not determined by the fact that the plaintiff's firm allowed Cooper to ship and receive the bill of lading for the flour; nor could it be determined by a subsequent transfer by Cooper to a voluntary assignee, nor by any transfer by Cooper, on account of an antecedent or other debt, or otherwise, except to a bona fide purchaser for value, without notice of the plaintiff's interest. (*Story on Sales*, § 292. *Leven v. Smith*, 1 *Denio*, 571. *Haggerty v. Palmer*, 6 *John. Ch.* 437. *Keeler v. Field*, 1 *Paige*, 312. *Hays v. Currie*, 3 *Sand. Ch.* 585. *Chitty on Bills*, 82. *Russell v. Minor*, 22 *Wend.* 659, 669 670. *Acker v. Campbell*, 23 *Wend.* 372.) (1.) The fact that the plaintiff's firm allowed Cooper to ship and receive the bill of lading for the flour, under an agreement necessarily implied from the facts and circumstances of the sale, it is sub-

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mitted, is as effectual to repel the presumption that such allowance to Cooper to ship and receive the bill of lading, was an absolute delivery of the flour to Cooper, with the intention of thereby vesting in him a full and perfect title to the flour, discharged of all conditions and trusts, as an express agreement that Cooper should procure the bill of lading and sell a bill of exchange on some party abroad, pledging the bill of lading as collateral, and apply the proceeds of such sale in payment for the flour, would be. (*See opinion of Senator Allen in Funniss v. Hone*, 8 *Wend.* 260.) (2.) The equity of the plaintiff's claim to a lien, is strengthened by the consideration, that if the failure of Cooper's house in London, before the departure of the Africa from England, and before the purchase of the flour by Cooper, had been known to him at the time of the sale, and he had obtained the possession of the flour and bill of lading, on the promise to pay cash, it would have rendered the purchase by him fraudulent, and the contract voidable by the plaintiff, if not void for that reason. The ignorance of both parties of this fact, of the failure of Cooper's house, at the time of the sale, would be a good ground for the rescission of the contract, on the ground of a mistake or ignorance of a material fact. (*See 1 Story's Eq. Jur.* § 140, &c.; *Leger v. Bonnaffe*, 2 *Barb. S. C. R.* 475, 478, 479.) The voluntary rescission of the contract by Cooper, should be held to have the same effect as a rescinding by the judgment of the competent court.

IV. The defendants having full notice of the interest of Dows & Cary in the flour, at the time of their demand of the flour or the bill of lading, or that the defendants account to them therefor, on the 23d May, 1851, before any advance or payment thereon, or on the bill of exchange of Cooper, to which the bill of lading for the flour was placed as collateral, were not bona fide purchasers for value, without notice. (*White & Tudor's Lead. Cases by Hare & Wallace, Phil.* 1851, vol. 2, pt. 1, page 91, and cases cited. *Murray v. Finster*, 2 *John. Ch.* 155. *Wormley v. Wormley*, 8 *Wheat.* 421.) And the

refusal of the defendants, on such demands, to deliver the flour or bill of lading therefor, in the defendants' possession, or to account therefor to the plaintiff's firm, and the withholding of the same to apply on account of any demands against Cooper, growing out of other unconnected transactions between Cooper and the defendants, was by reason of the plaintiff's lien aforesaid, a wrongful conversion of the flour, which entitled the plaintiff to recover the value of the flour and interest, as damages for such conversion.

V. The conclusion of the referee, in effect, that the transaction between Cooper and the defendants, on or about the 19th May, 1851, was a sale of the bill of exchange, for £625, which was executed by the delivery thereof and of the two bills of lading as collateral, so as to vest the absolute and unqualified title to the bill of exchange and to the collaterals in the defendants, and to render the defendants debtors to Cooper, for the amount to have been paid for the bill of exchange, and that such indebtedness was available to the defendants, as a demand by Cooper upon them, against which the defendants were entitled to set off in this action, other demands against Cooper, growing out of other and independent transactions, and so by means of this circuitry to apply the collaterals on account of such other demands against Cooper, are founded upon a misapprehension of the effect of the allegations of the pleadings, in regard to the delivery of said bill of exchange, with the collaterals, and a strange misapprehension of the nature and legal effect of the transaction between Cooper and the defendants, touching the sale (so called) of the said bill of exchange, and of the law applicable thereto. (1.) Regarding the draft or bill of exchange by Cooper, on his own house, accompanied by the collaterals, as merchandise, goods and chattels, the title to which would pass by an absolute delivery thereof to the custody of the defendants, upon their promise to purchase and pay cash, the title to the bill of exchange and collaterals, did not pass to the defendants, for the reason that the delivery in this case of the papers, in anticipation of the pay-

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ment to have been made on demand, or on the next packet or steamer day, was in compliance with the usage in cases of sales for cash, and therefore not an absolute delivery thereof, which had the effect to vest an absolute and unqualified title to the bill of exchange, and to the collaterals in the defendants. (*See the cases cited under point 2.*) (2.) But independently of the inference that the delivery of the papers to the custody of the defendants was not an absolute and unconditional delivery, from the fact of its being in compliance with the usage aforesaid, by the pleadings in this case, the delivery is admitted to have been conditional upon payment. The finding of the referee, therefore, that the bill was absolutely delivered, so as to vest an unqualified title in the defendants to the bill and collaterals, is erroneous, and the defendants were not entitled to retain the bills of lading as collateral security, for the acceptance and payment of the bill of exchange, by reason of such delivery, either as against the defendants or as against Cooper. (3.) But the transaction between Cooper and the defendants was not the case of a sale and delivery of merchandise, goods or chattels, but of a security for the payment of money, the title to which, with a right of action thereon, which is necessary to complete the title, does not pass by a mere delivery of the papers; and of which the validity in the hands of the defendants was entirely dependent upon the payment of the consideration to have been paid therefor by the defendants, for the reason, that by the rule of law applicable to such securities, the refusal of the defendants to pay the amount to have been paid therefor, discharged Cooper from all liability to the defendants for its acceptance and payment, and as a consequence of such discharge, put an end to any claim of the defendants to retain the bills of lading, placed as collateral to such liability, to secure the acceptance and payment of the draft. The entire failure of the consideration has the same effect as its original and total absence. (*Byles on Bills*, 98.) (4.) According to the good sense of the transaction between Cooper and the defendants, and its legal effect, the thing stipulated

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for by the defendants, for which they were to pay the amount to have been paid by them, was the liability of Cooper for the acceptance and payment of the amount of the draft, to be secured by the collaterals, and not the mere delivery of the possession and custody of the papers, in anticipation of payment, and of the liability of Cooper to the defendants for the acceptance and payment of the draft to accrue on such payment, and that liability failing, the mere delivery and custody of the bill of exchange and the collaterals by the defendants, under the unperformed agreement of the defendants to pay the amount agreed to be paid for such liability, to be secured by the bills of lading, as collaterals thereto, without any averment or proof that such custody of the papers was of any benefit or advantage to the defendants, was not a sufficient consideration to support and give validity to the pretended liability or indebtedness of the defendants to Cooper, for the amount to have been paid therefor. (*Addison on Cont.* 374, and case cited. *Swan v. Cox*, 1 *Marsh*, 126. *Trimble v. Green*, 3 *Dana's Ken. Rep.* 356, 7. 2 *Kent's Com.* 463, 4, 5.) The transaction between Cooper and the defendants, may be resolved into a case of mutual promises, without any mutuality of contract and obligation, in which there was nothing to bind the defendants to the continuance of their promise. (*See Addison on Cont.* 22 to 24) (5.) The referee erred therefore in holding that the defendants were authorized to set off other indebtedness of Cooper, against the pretended indebtedness of the defendants to Cooper, for the amount to have been paid for the draft of £625. (6.) The cases cited by the defendants before the referee, of *Eland v. Carr*, (1 *East*, 375;) *Comforth v. Rivett*, (2 *Maule & Selw.* 510;) *Lechmere v. Hawkins*, (2 *Esp. N. P. Rep.* 626;) *Taylor v. Okey*, (13 *Vesey*, 180;) and *Downer v. Eggleston*, (15 *Wend.* 51, 54,) were all cases of actions upon contract, in which there were mutual subsisting demands at the time of the action brought, and such as the statutes of set-off gave the party defendant power to set against the plaintiff's demand. But no one of these cases recognizes any right of

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set-off, except in actions in form *ex contractu*, nor on demands which would not themselves be the subject of set-off according to law. As to which, see 2 *R. S.* 354; 3d ed. 450; and *Downer v. Eggleston*, (15 *Wend.* 58.) The case of *Chapman v. Lathrop*, (6 *Cowen*, 110,) also cited below, is not an authority to the point that a set-off can be allowed in an action of trover, where such action lies, but it is an authority only to the point, that goods cannot be reclaimed by the vendor, after the property has been changed by a delivery to the vendee, sometimes cited for the extreme views as to the effect of a delivery to pass the title—views which have been virtually overruled by the later cases. (See note at the end of the case, and comment on the note in *Russell v. Minor*, 22 *Wend.* 670.)

VI. The flour, and bill of lading for the flour, having been deposited with the defendants, as a collateral security to the liability of Cooper, for the acceptance and payment of the draft which never had any inception, or was discharged by reason of, or on the refusal of the defendants to pay the amount to have been paid therefor, the defendants had no right to retain the flour or bill of lading to apply on debts of Cooper, growing out of other unconnected transactions. (*Story on Agency*, § 381. *President of the Neponset Bank v. Leland*, 5 *Metc.* 259. *Murray v. Burling*, 10 *John.* 174. See also *Brandas v. Barnett*, 3 *Mann. Gran. & Scott*, 530; *Green v. Farmer*, 4 *Burr.* 2218; *Key v. Flint*, 4 *Eng. Com. Law Rep.* 1; 2 *Story's Eq. Jur.* § 1433, at end, and § 1441.)

VII. And the refusal of the defendants to deliver the flour or the bill of lading therefor, in their possession, or to account therefor, on the demand made by the plaintiff, was a conversion thereof. (See *Zachrisson v. Ahman*, 2 *Sand. S. C. R.* 68.)

F. B. Cuttigny, for the defendants. I. The title to the 500 barrels of flour, passed to, and was absolutely vested in, Edward B. Cooper, at least so far as to enable him to dispose of the same to a bona fide purchaser, or for the purpose of obtaining advances or credit thereon.

II. The sale and delivery by Cooper, on the 19th of May, 1851, to the defendants, of his bill of exchange on Cooper, Felton & McLane, of London, for £625, upon the security of bills of lading of the flour and butter, was absolute, and vested the title to the bill of exchange in them, and also invested them with a right to the aforesaid securities, as against Cooper and the plaintiff.

III. The defendants became and were indebted to Cooper for the price of the said bill of exchange, viz: £625 (\$3074.72.)

IV. At the time the said indebtedness occurred, the defendants were creditors of Cooper, and had a valid set-off against the price of the said bill of exchange for the amount of Cooper's two bills of exchange on Cooper, Felton & McLane, amounting together to £485, which had been protested, and of the dishonor of which due notice had been given to Cooper. The defendants were also creditors of Cooper, as being the holders and owners of another bill of exchange drawn by him on Cooper, Felton & McLean, for £235, which last mentioned bill had been dishonored the 13th May, 1851, and of which Cooper was duly notified.

V. The right of the defendants to set off their demand was not impaired by the circumstance that the bill of exchange was sold by Cooper for cash. (*Downer v. Eggleston*, 15 *Wend.* 51. *Elan v. Kerr*, 1 *East*, 375. *Comforth v. Rivett*, 12 *M. & Selw.* 510.)

VI. The defendants were entitled to the possession of the bills of lading of the flour, and to the papers therein specified as against Cooper and the plaintiffs: consequently they were not guilty of conversion.

By the Court, DAVIES, P. J. It is not controverted in this case, that the defendants were not bona fide holders or purchasers of the bills of lading or exchange. They have paid nothing therefor, nor parted with any thing of value upon the faith thereof. They stand precisely, therefore, in reference to the debt due from Cooper to them, in the same position as

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they would have occupied if Cooper had not delivered the bills to them, and they had not agreed to purchase the same.

The question then recurs, had Cooper such an absolute title to the flour that he could set up such title, as against the plaintiffs, who undeniably are the true owners thereof, unless they by their acts have constituted Cooper the absolute owner? If I correctly apprehend the first conclusion of law found by the learned referee, it is that the delivery of the flour to Cooper was absolute, and vested in him the title, at least to such an extent that he might sell and deliver it to a bona fide purchaser for value, or dispose of the bill of lading in the same manner. But it being conceded that the defendants are not such bona fide purchasers, does it not follow from the referee's finding, that Cooper had not such absolute title as would enable him to make title in one not a bona fide purchaser?

If Cooper was the absolute owner of the property, and the defendants became his debtors on sale of it to them, there could be no controversy as to their right to set off, against the debt they owed Cooper, those he owed to them. The question therefore recurs, was Cooper, under the circumstances disclosed, the absolute owner of the flour?

It was purchased for cash on delivery; that is, the cash was to be paid within ten days. The very terms and import of this arrangement are that there was to be a qualified delivery, which was to precede the payment; and it is apparent from the facts in this case that the possession of the goods was intrusted to the vendee for the purpose of enabling him to realize upon them, and thus provide means for the payment of the price. Such an understanding, arrangement or custom, cannot, we think, be construed into an absolute transfer of the title to the property, as between the original parties to it, or those who have no greater equities than the original parties.

A case analogous to this has been lately decided in this court, and will be found in 25 Barb. 474, (*Fleeman v. McKean*.) The facts are strikingly similar to those presented in this case, and the reasoning of the court is so sound and con-

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clusive, and so strongly fortified by authority, that it is deemed necessary only to refer to it. It being a decision of this court so directly in point, we feel it our duty to adhere to it, as the law, and abide by it. We entirely concur in the correctness of the principles there enunciated, and have no hesitation in adopting them.

The judgment appealed from in each case is reversed, and a new trial ordered, costs to abide the event.

[NEW YORK GENERAL TERM, September 20, 1858. *Davies, Sutherland and Hogeboom, Justices.*]

SHERMAN vs. WELLS, president of the American Express Company

Persons whose business it is to receive packages consisting of coin, bullion, bank notes, commercial paper, and such other articles of value as parties think fit to intrust to their care, for the purpose of transporting the same from one place to another, for a compensation, are *common carriers*, and responsible as such for the safe delivery of property intrusted to them.

And they will be held to the stringent rule of law which makes a carrier an insurer against all except the act of God and the public enemy.

Where goods are intrusted to a carrier and not delivered according to contract, the value of the goods, with interest thereon from the day when they should have been delivered, is the measure of damages.

APPEAL from a judgment entered upon the report of a referee. The action was brought for the purpose of charging the defendant, as a common carrier, for the value of certain bonds of the state of Michigan, intrusted to him at Buffalo, for transmission to the plaintiff at Detroit, and which he failed to deliver. The defendant put in an answer denying that he was a common carrier, or liable as such, and alleging that he was the president of the American Express Company, an association transacting a general express agency, for hire, but not doing business as common carriers. The answer also put in issue the other material allegations of the complaint.

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The cause was referred to a referee, (Hon. E. P. Cowles,) who made his report, by which he found the following facts : *First.* The defendant was the president of a company generally called the American Express Company. The principal office of such company was kept in the city of Buffalo. It was an unincorporated company, had branch offices, and agents in charge of such branch offices, in most of the principal cities to the west of Buffalo, and was largely engaged during the year 1852 in the business hereinafter more particularly described. The firm name of such company was Livingston, Fargo & Co. *Second.* Said express company received at its office in Buffalo, packages consisting of coin, bullion, bank notes, commercial paper, and such other articles of value as parties thought fit to intrust to the care of such company, for the purpose of being transported to other points west of Buffalo ; and for its services in respect of its undertaking concerning such packages, said company charged and received a price per package proportionate to the intrinsic value of such package in part, and regulated also in part by its size and weight, and upon receiving it took upon itself the duties hereinafter more particularly described. *Third.* Upon the receipt of such packages at its office in Buffalo, the said company uniformly gave receipts. That the general form of receipt was known generally to the public, and to the Patchin Bank, as the form of receipt given, except in exceptional cases, and hereinafter more particularly described. *Fourth.* The instances in which receipts in a special form were given by the said express company, were as follows : Certain of the banks in Buffalo, among which was the Patchin Bank, and certain private bankers and brokers in said city who were in the habit of intrusting packages to said express company, provided themselves with a receipt book, which book was kept by such several parties, and upon which blank receipt books the express company upon the receipt of packages from such parties, respectively gave receipts for such packages, and such receipts were of the character and in the terms substantially, *mutatis mutandis*, of the particular receipt

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hereafter set forth as given to the Patchin Bank. *Fifth.* On the 19th day of August, 1852, the Patchin Bank delivered to the said express company in the city of Buffalo, a package containing six several bonds issued by the state of Michigan, four of which were conditioned for the payment of the sum of \$1000 each, one of which was conditioned for the payment of the sum of \$500, and one of which was conditioned for the payment of the sum of \$100, all bearing interest at the rate of six per cent per annum, and all of them belonging to the plaintiff in this action; such bonds were enclosed in an envelop directed to J. C. W. Seymour at Detroit, Michigan. The company, upon receiving the package from the Patchin Bank, made an entry on its own books as follows: "1 Pa. 4600, Pat. Bk., J. C. W. Seymour, Oct. 3, 75," the meaning of which is as follows: "Received one package of \$4600 from the Patchin Bank for J. C. W. Seymour, at Detroit. Express charge to Detroit, \$3.75." And at the same time of the reception of such package the said company, through Mr. Stanley, one of its authorized agents, gave to the Patchin Bank a receipt in the blank receipt book kept by such bank of the packages it was in the habit of delivering to such express company, and which receipt was in the words and figures following, viz:

"Buffalo, Aug. 19, 1852.

Received of the Patchin Bank of Buffalo, the following package in good order, directed to J. C. W. Seymour, Esq., Cash., &c. Detroit, Mich.

L. F. & CO.,

Amount, \$4,600.

per STANLEY."

In the delivering of the said package and the taking of such receipt, the Patchin Bank acted as the agent of the plaintiff, but did not then disclose the fact of such agency. *Sixth.* The regular business of the express company before and at the time of the reception of such package, and which it held itself out to the world to perform in respect of all packages delivered to it, was as follows, viz: Upon the reception of such packages by the express company they were taken in charge by such

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company at its office; they were then transported in vehicles owned by said company and in charge of its servants, to the rail road depot at Buffalo, or to one of the steam boats leaving the port of Buffalo, when they were put on board either of a baggage car upon such rail road, or on board of such steam boat. If placed upon the rail road car they were placed in a baggage car devoted to the transportation of packages in charge of such express company. In all cases, whether such packages went forward by rail road or steam boat transportation, an agent of the express company was sent forward with them having such packages under his special charge and supervision. The freight upon such packages, and all charges thereon, were in all cases paid by such express company, the owner of such packages paying no further or other charges than such as the express company charged or received at the time of the receipt of such packages. Upon the arrival of such packages at any terminus of a route, whether by rail road or steam boat, such packages, if they were to go still further forward, were taken by the agents and servants of such express company in vehicles owned by it and under charge of its servants, and transported to the next point of rail road or steam boat departure, as the case might be, and then again taken forward by such new route in the same manner and under charge of agents of such express company as above set forth; and this mode of transportation in all respects was continued until the said packages reached the city or town of their destination, when they were taken in vehicles of the said express company and delivered by servants of such company to the parties to whom they were consigned or directed. Such regular course of business was well understood by the public and by the Patchin Bank at the time of the delivery of the package of bonds above described. The said express company had no interest in any of the lines of public conveyance by which said packages were carried, or in the moneys received by the persons or corporations owning such lines of public conveyance. *Seventh.* The said package of bonds so delivered to the express company as

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aforesaid, on the 19th of August, 1852, was put in charge of a servant of the company, and on the same day was taken in a wagon belonging to the said company, to the steam boat Atlantic, then lying at Buffalo, and which was then engaged in running from Buffalo to Detroit. It was placed in a carpet bag with a quantity of gold and other valuable papers and packages, in like manner delivered to such company for transportation, and upon its arrival at the steam boat, was taken to a state room on board of such boat, hired by the servant of the company, having such package in charge, and in such state room was placed an iron safe belonging to the said express company, in which such package was locked up by such servant and the key thereof kept by himself. The said steam boat left Buffalo on the evening of the same day for Detroit. The boat was commodious, staunch, safe and seaworthy; such servant slept in the above named state room, and while he was so sleeping, and at about 2 o'clock A. M. of the 20th of August, 1852, a propeller navigating Lake Erie came in collision with the Atlantic, striking her near her bows and making a breach in her side, through which the water rushed rapidly, and the boat commenced sinking at her bows. A large number of passengers were on board, about 300 of whom were drowned in consequence of the collision and sinking of the steamer. The boat filled rapidly and went down, bow first, at an angle of about 30 degrees, until the bows touched the bottom, leaving a part of the stern of the boat out of water, from which the remainder of the passengers were taken off by a vessel which came to the assistance of the sinking steamer. It was about two hours after the collision when the last of the passengers left alive were taken off, but the fact that the steamer was sinking and must go down was apparent within a very few minutes after the collision took place. It was probably physically possible for the servant of the express company to have taken the carpet bag in his hand and carried it on board of the assisting vessel, but none other than a man of most extraordinary and unusual coolness and self-possession in the pres-

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ence of such a casualty, would have undertaken it, and to have attempted to do so would have been attended at the time with additional peril to the life of the messenger by reason of its tending to encumber him, and by reason of the confusion which prevailed among the passengers. The iron safe containing the bonds in question went down with the steamer, and said bonds were in the safe when it went down. The express company had no interest in the steamer Atlantic, or in her profits, and was in no way interested in the business which she was then engaged in. The servant of the said company, in charge of the bonds, was saved by the vessel which came to the assistance of the sinking steamer. *Eighth.* Said bonds were at the time of their loss worth the amount of principal and interest then due upon them. They all bore date, April 8th, 1850. After their loss, the plaintiff and defendant both joined in attempts to induce the state of Michigan to pay such bonds as lost bonds, which the said state refused to do; and having advertised for said bonds to be presented at the proper office for payment, said state stopped the interest upon them, from and after the 30th of January, 1853. *Ninth.* The said express company had not either conditionally or otherwise promised the plaintiff to pay him the amount of said bonds. *Tenth.* The whole amount of principal was due upon said bonds at the time of their loss in the Atlantic, with interest thereon, at the rate of six per cent, from the 8th day of April, 1850, and no part of that sum had since been paid.

Upon these facts, the referee determined as matter of law, as follows, viz: *First.* That the American Express Company received such bonds as common carriers, to be carried by such company from the city of Buffalo to the city of Detroit, and there delivered to Mr. Seymour, at his place of business. *Second.* That the said company did not by special contract or otherwise limit or restrict its liability as such common carriers. That the plaintiff upon the foregoing facts was entitled to judgment against the defendant for the sum of \$6634.46, being the amount of principal and interest due upon the bonds.

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For which sum, with costs, judgment was entered, and the defendant appealed.

W. A. Hardenbrook, for the appellant. I. The defendants were guilty of no negligence to charge them for the loss of the Michigan bonds.

II. The defendants are not common carriers, or responsible as such. (*Roberts v. Turner*, 12 John. 232. *Brind v. Dale*, 8 Car. & Payne, 207. *Hersfield v. Adams*, 19 Barb. 577.)

III. For all losses by navigation the general owner, or owner *pro hac vice* of the vessel, is the common carrier, and alone responsible as such. (*New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344. *Green v. Clarke*, 2 Kernan, 343. *McIntyre v. Bowne*, 1 John. 229. *Gracie v. Palmer*, 8 Wheat. 605. *Clarkson v. Edes*, 4 Cowen, 470. *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch, 39.)

IV. The defendants, by their course of business, known to the plaintiff, restricted their liability; their general receipt to the contrary notwithstanding. (26 Eng. L. and Eq. Rep. 297. 2 Duer, 480. *Van Santvoord v. St. John*, 6 Hill, 158. *Parsons v. Monteath*, 13 Barb. 353.)

V. The plaintiff was entitled to recover no more damage than the bonds were worth as the evidence of a debt; parol testimony in case of their loss being also admissible to establish the demand. (9 John. 96. 2 Parsons on Cont. 441, 465.)

I. T. Williams, for the plaintiff. I. Expressmen are *per se* common carriers. (1 Parsons on Cont. 201. 2 Duer, 480.) This very company has been held to be a common carrier. (*See Russell v. Livingston*, 19 Barb. 346.)

II. It is wholly immaterial whether the defendant owned the vehicles of transportation, or not. (19 Barb. 352. 14 id. 555. 9 id. 322. 19 Wend. 332. 3 Sandf. 613.)

III. The defendant owned the conveyance a part of the distance, which in any view brings the plaintiff within the cases in 3 Sandf. 248, and 8 M. & W. 421.

IV. The case of *Roberts v. Turner*, (12 John. 232,) does

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not militate against this position. That was the contract of a forwarder and not of a carrier. (*See p. 233.*) See also *Ld. Kenyon's* definition of a common carrier, or rather his "criterion." See criticisms on this case, 19 *Wend.* 332; 9 *Barb.* 322. The transaction in question has the following indications that the defendant acted and contracted as, and in fact was, a common carrier. (1.) The defendant received the whole of the consideration of carriage and delivery. (2.) Freight was charged by the defendant for the whole route. (8 *M. & W. p.* 421.) (3.) The parcel was never delivered to the steam boat officers or owners, and was never in their custody. (4.) The package remained in the exclusive custody of the defendant, and was so at the time of the loss. (5.) When lost, the bonds were in process of transportation, and in the exclusive custody of the defendant. What more than this can ever exist as the elements that go to constitute a carrier? (6.) It was the uniform business of the company to transport not only money but bulky articles. (7.) They ran cars on the rail roads. (8.) They had exclusive control of the state room and had a permanent fixture in it in which the bonds were locked up. (9.) Suppose, instead of riding, the messenger had walked to Detroit, would he then have been a carrier? If so, suppose that while on his way he had got into a cart or wagon and rode a few yards or miles, and during that time had met with a misfortune that had resulted in the loss of the bonds, would this have affected his liability? (10.) The party who carries is, in the eye of the law, the party who has the profits of carrying. Of a very necessity all others must be merely agents of a party who has the benefit; the party who has the benefit is the "party in interest." Shall a party have the benefits of an enterprise and still shift responsibility? This would be in the teeth of every legal analogy. (11.) Who did undertake to carry this package? Some one did, or the defendant is liable as a trespasser. Was it the boat? The officers of the boat neither knew nor had the means of knowing that it was on board; had no control over it whatsoever.

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V. The measure of damages is the face of the bonds, unless the one party prove it to be more, or the other prove it to be less. (*Sedg. on Dam.* 512, 13. 1 *Cowen*, 240. 10 *M. & W.* 575. 2 *Rawle*, 241. 2 *Taunt.* 440. 1 *Barn. & Adol.* 528. 3 *Camp.* 476. *Angell on Carr.* § 285. 13 *East*, 509. 2 *Par. on Cont.* 471.)

VI. It is immaterial whether the defendant be a common carrier or no; for there was an absolute contract to carry and deliver. (2 *Meeson & Welsb.* 421.)

By the Court, DAVIES, P. J. The facts are succinctly and correctly stated in the referee's report, and the only question presented is, are the defendants liable for the loss of the bonds intrusted to them? That the defendants are common carriers, cannot, we think, be doubted. It was settled that they were, in the case of *Russell v. Livingston*, in this court, (19 *Barb.* 346.) The judgment in that case was reversed in the court of appeals, (16 *New York Rep.* 515,) but on an entirely different point. The defendants being, therefore, common carriers, and there being no special contract, the parties are to be supposed to have acted with a full knowledge of their legal rights and liabilities, and must be held to the stringent rule of law which makes a carrier an insurer against all except the act of God and the public enemy. (*Dorr v. The New Jersey Steam Navigation Co.*, 1 *Kern.* 485.)

When goods are intrusted to a carrier and not delivered according to contract, the value of the goods, with interest thereon from the day when they should have been delivered, is the measure of damages. (*Sedgwick on Damages*, 255.) We think the proof fully authorized the referee to find that the bonds were of their par value, and that no injustice has been done the defendants in this respect.

The judgment appealed from will therefore be affirmed, with costs.

JUBE *vs.* THE BROOKLYN FIRE INSURANCE COMPANY.

Conditions annexed to a policy of insurance are a part of the contract, and have the same effect as though written in the body of it; and when a condition, thus forming a part of the policy, is not complied with, the assured cannot recover in case of loss.

Where a policy contained a condition that the assured should produce, if required by the assurers, his books of account and other vouchers in support of his claim, and permit extracts and copies to be made; and that until such proofs &c. were produced, or if they were refused when demanded, the loss should not be payable; and being required by the assurers, after a loss, to produce his invoices or bills of goods purchased, or duplicates thereof, he told them it was impossible to do so; that he had only found a few bills; and although he afterwards found others, he did not produce any to the assurers, but, on being required to furnish further statements and the bills of purchase, he, acting under the advice of counsel, declined to do so; *Held* that no recovery could be had, upon the policy.

THIS cause was tried at the circuit and a verdict rendered for the plaintiff, and a motion, made at a special term for a new trial, denied. The defendants then appealed to the general term. James Carpenter took from the defendants a policy of insurance on his stock of goods in a store situate in Brooklyn, upon which a loss was sustained. Carpenter assigned his claim against the defendants to the plaintiff, and this suit was brought to recover the amount of such loss. By the ninth condition of the policy taken from the defendants by Carpenter, it was provided that "whenever required in writing, the insured or person claiming shall produce and exhibit his books of account and other vouchers to the insurers or their agents, at the office of the company, in support of his claim, and permit extracts and copies thereof to be made." And in the same condition it was further provided that until such proofs &c. were produced, or if they were refused by the claimant as required, the loss should not be payable. On the trial it was proved that the company, after the loss happened and claim made upon them, gave a notice in writing to Carpenter, requiring him to produce "all original invoices or bills of goods purchased, or duplicates of the same, and all other vouchers

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relating to your business for said period." The witness, Carpenter, testified on the trial that he "had found only a few bills. I have found others, but only a part, but did not produce any to the defendants. They asked me to furnish further statements and the bills of purchases, or duplicates of them, but under the advice of counsel I declined."

The counsel for the defendants moved the court to dismiss the complaint, upon the ground in substance that the insured had not complied with the provisions of the ninth condition in producing the vouchers, bills of purchase or duplicates of them, which motion was denied and the defendants excepted. The jury found a verdict for the plaintiff, upon which judgment was entered, and the defendants appealed.

D. P. Barnard, for the defendants.

E. A. Doolittle, for the plaintiff.

By the Court, DAVIES, P. J. The only question which I propose to consider, is, whether the assignor of the plaintiff complied with the conditions of his policy, so as to entitle the plaintiff to recover. The conditions annexed to the policy are parcel of the contract, and have the same effect as though written in the body of it; and where a condition, thus forming part of a policy, is not complied with, the plaintiff cannot recover. (*Jennings v. The Chenango County Mutual Ins. Co.*, 2 Denio, 75.) In the case of *Smith v. The Saratoga County Mutual Fire Ins. Co.*, (1 Hill, 497,) the parties by the policy had agreed that the policy should not be assigned without the consent of the company, and the insured did assign it without such consent, and the court held there could be no recovery on the policy. BRONSON J., in giving the opinion of the court said: "However strongly we may desire to get rid of this conclusion, (viz, that the assignment without the consent rendered the policy void and of no effect,) I do not see how it

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can be done. The parties must abide by the contract they have made."

The court of exchequer, in England, in *Mason v. Harvey*, (8 *Exch. Rep.* 819,) held that these conditions are reasonable and for the benefit of the insurers, to enable them to decide upon their rights and the extent of their liability before they are called upon to pay, *and no liability attaches until they have been complied with by the insured.*

In *Haff v. Marine Ins. Co.*, (4 *John.* 132,) Thompson, J., in delivering the opinion of the court, says, "good faith and the true spirit and intention of the clause requiring preliminary proof of loss, required the plaintiff to disclose at least all the documentary evidence in his possession touching the nature and extent of the loss. * * * The very fact of not producing it was calculated to awaken suspicion." And in that case the court held that the omission to produce was fatal to the plaintiff, and he should have been nonsuited.

The assignor of the plaintiff in this case had agreed, and it was part of the policy, that he should produce, if required by the assurers, his books of account and other vouchers in support of his claim, and permit extracts and copies to be made. He was required by the defendants, as he testifies, to produce his bills of purchases; he says he told them it was impossible to do so; that he had only found a few bills; that he had since found others, but only a part, *but did not produce any to the defendants*; that they asked him to furnish further statements, and the bills of purchases, or duplicates of them, but under the advice of counsel he declined. It is apparent from this testimony, that Carpenter had some of these vouchers or bills at the time of the demand for them, and could have complied with it, to that extent. But he did not, and it would seem he did refuse under the advice of counsel. We think he was not to judge of the materiality or importance of the papers required. He had agreed to produce them; that is, all such as he had in his possession or with reasonable in-

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quiry could be found, and not having complied with such agreement, we are unable to see how he can recover.

The case of *Bumstead v. The Dividend Mutual Ins. Co.* (2 Kern. 81,) cited and relied on by the plaintiff's counsel, does not conflict with these views, but we think is in harmony with them. The court excused the insured from the non-production of the papers and vouchers, upon two grounds: First, that they had all been consumed in the fire, and secondly, that the assurers had waived the non-production. Neither of these grounds are applicable to the present case. The court, we think, correctly held that these conditions are to receive a reasonable construction, and are to be construed as requiring only as full and accurate an inventory, statement and production as the party, without fraud or fault on his part, is able to furnish. All that the party was required to produce was such papers as he had in his possession or under his control. We do not see that he had agreed to procure and produce duplicates of his bills of purchases; or that he was under any obligation to procure them and deliver them to the assurers. But we think he did not produce those which he had in his possession or under his control, and which the assurers had a right to require; and that the justice at the circuit erred in refusing to nonsuit the plaintiff and dismiss the complaint.

The judgment must be reversed, and a new trial ordered, costs to abide the event.

[NEW YORK GENERAL TERM, September 20, 1858. *Davies, Sutherland and Hogeboom, Justices.*]

G. and J. RUSHER vs. SHERMAN.

After an insolvent's discharge is granted, if the officer has acquired jurisdiction, it is conclusive in all other proceedings in which it comes in question.

Objections to it, not relating to the jurisdiction of the officer, cannot be raised collaterally, in an action against the insolvent for the collection of a debt claimed by him to be discharged. If such objections are well taken, the remedy is by a direct review of the proceedings, upon certiorari.

What steps are necessary to be taken, to give the officer jurisdiction, so as to make his subsequent proceedings, and the discharge of the debtor, conclusive.

Where affidavits of petitioning creditors are sworn to before a New York commissioner residing in another state, the certificate of the secretary of state of the latter state, proving the official character of such commissioner, is not necessary to give jurisdiction to the judge before whom the proceedings are pending.

It seems, the jurisdiction of the officer may be shown by parol.

On the other hand, although the discharge furnishes evidence of the performance of the jurisdictional conditions, it does not prevent the party assailing it, from showing that the officer in reality had no jurisdiction.

THIS was an action upon a promissory note. The defense was the discharge of the defendant from his debts, under the insolvent act. The jury found a verdict for the defendant, and from the judgment rendered thereon the plaintiffs appealed

Barrett & Brinsmade, for the appellants.

E. R. Sherman, for the respondent.

By the Court, INGRAHAM, J. Upon the trial of this cause the defendant offered in evidence proceedings to obtain a discharge from his debts, had before Judge Daly, and a discharge granted by that officer. Various objections were taken to those proceedings, which were overruled by the court, and the justice submitted to the jury the question of fraud in concealing property. The jury found for the defendant.

Many of the objections taken to the proceedings before Judge Daly were not in regard to matters affecting the jurisdiction of the officer. Those of them which related to any fraudulent

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disposition or concealment of property were submitted to the jury, and the finding thereon is conclusive. Those objections which did not relate to the jurisdiction cannot be reviewed collaterally in this action. If any such objections were well taken, the remedy was by a direct review of the proceeding on certiorari to the officer. After the discharge was granted it was conclusive in all other proceedings in which the discharge came in question. (*Jackson v. Robinson*, 4 *Wend.* 440.) Even where the case is brought before the court on certiorari, many of the objections taken are unavailing, because they were not presented to the officer at the hearing. This rule was applied to a case in which the true cause and consideration of the indebtedness was not stated in the insolvent's proceedings. In such a case Mr. Justice Strong, after admitting that the true cause and consideration of indebtedness was not stated in the proceedings, adds: "That matter was proper for the consideration and determination of the judge who heard the petition. The creditors had the notice required by the statute to show cause why an assignment of the insolvent's estate should not be made and he be discharged from his debts. If they neglected to appear and raise objections, they should be concluded if the officer had the requisite jurisdiction, except as to matters which the statute declares shall avoid the discharge." (*The People v. Stryker*, 24 *Barb.* 649.) And in *Stanton v. Ellis*, (2 *Kernan*, 575,) Denio, justice, says, "The rule therefore is, that where the officer has acquired jurisdiction, the discharge reciting the performance of the subsequent statutory requirements is incontrovertible evidence that they have been performed as stated, but it is not in the power of the officer to create such evidence, unless he has in the first place acquired a right to proceed in the case by the performance by the party of the preliminary steps required by law to be taken as a condition to his entertaining the case."

The question then arises, what is necessary to give the officer jurisdiction, so as to make his subsequent proceedings and discharge of the debtor conclusive? 1. A petition signed by

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the debtor and two-thirds in amount of his creditors residing within the United States. 2. The affidavits of the petitioning creditors, taken before an officer authorized to take affidavits to be read in courts of record, to the amount, nature and consideration of the debt, and that the creditor has received nothing to become a petitioner. 3. A full and true account of his creditors, the amount due to them, the consideration thereof, a statement of any judgment or other security for the payment of the debt; and a full inventory of his estate. 4. An affidavit to be made by the petitioner, to be taken before the officer, of the correctness of his petition, &c. 5. Proof of residence within the county where the officer resides.

These are all the requisites to give the officer jurisdiction; and where such a state of facts appears before the officer in the papers presented, he acquires that jurisdiction which makes his subsequent acts valid and the discharge granted by him conclusive.

The affidavits, in this case, of three of the petitioning creditors were sworn to before a New York commissioner residing in Connecticut. No certificate of the secretary of state was annexed to the affidavits, to prove that the person administering the oaths was such officer at the time of presenting the petition. The act of 1850, under which such commissioners are appointed, provides that before such an affidavit shall be entitled to be used or read in evidence, there shall be subjoined or affixed to the certificate, a certificate of the secretary of state that such commissioner was duly authorized to take the same, &c.

The question then arises, whether the certificate of the secretary was necessary to give jurisdiction. The insolvent statute requires that the affidavit shall be made before a person authorized to take affidavits to be read in courts of record. It is not denied that the commissioner had such authority. The provision of the statute was fully complied with, as to these affidavits. The defect is in the mode of certifying the proof to the magistrate. This is a provision in a statute passed

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subsequent to that in regard to insolvents, and the want of the certificate is not, in my judgment, a jurisdictional defect. Notwithstanding this defect, the statute has been obeyed, and it forms one of those errors which although not strictly in accordance with the law, was cured by the discharge. A variety of cases may be found where it has been held that the facts upon which an officer has to decide, although jurisdictional matters, are cured by the discharge, if erroneously proven.

In *Jenks v. Stebbins*, (11 *John*. 224,) it was held that the discharge was evidence that the debtor had been a resident of the county before presenting his petition, without any proof of that fact *aliunde*; and in that case Mr. Justice Spencer added, "that the officer has jurisdiction may be proved by parol, or by relying on the facts set forth in the discharge."

That case was approved in *Barber v. Winslow*, (12 *Wend*. 102.) Mr. Justice Nelson held that the production of the discharge was *per se* evidence sufficient of the facts indispensable to give the officer jurisdiction, subject to proof showing affirmatively that the officer had no jurisdiction. A similar opinion has been expressed by Chief Justice Shaw, in *Betts v. Bagley*, (12 *Pick*. 572.) In that case the papers presented showed that two-thirds of the creditors in amount petitioned with the insolvent, but upon the trial it was proposed to show that in reality two-thirds of the creditors had not joined in the petition. The chief justice held that the papers gave jurisdiction to decide whether there was in reality two-thirds of the amount due to the petitioning creditors or not, and the discharge was, on that point, conclusive.

If, as is said in *Jenks v. Stebbins*, and *Barber v. Winslow*, the jurisdiction may be shown by parol, then the subsequent production on the trial of the certificate of the secretary of state removed the defect, and showed that in reality the officer had jurisdiction at the time of receiving the papers.

In all the cases, however, although the discharge furnishes evidence of these jurisdictional matters, it does not prevent the party from showing that the officer in reality had no juris-

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diction. This is not done by the proof in this case. On the contrary, the proof establishes that the oaths to the affidavits were properly administered by a competent officer, and that the only defect was in the mode of proving that fact to the officer.

In *Van Alstyne v. Erwine*, (1 *Kernan*, 341,) Denio, J., says, "a liberal indulgence must be extended to these proceedings, (by attachment,) even upon questions of jurisdiction, if we would not render them a snare rather than a beneficial remedy." The same remark is applicable to proceedings for the discharge of insolvent debtors. The objection is purely technical, and without merits. To hold such a defect to be fatal, when the proof shows that the officer was fully authorized to act, would be a wide departure from the rule as laid down in that case.

We have been referred to *Small v. Wheaton*, in 2 *Abb. Pr. Rep.* 175. In that case the affidavit of the petitioner was not made before the officer conducting the proceedings, as the statute required. This was not a mere omission that could be remedied by proof, but the paper showed on its face that it was a nullity and could not be made valid, the same having been made before a person who had no authority to take that affidavit. In the one case the proof showed that there was no authority; in the other that the authority existed.

Some names are signed to the petition without any amount set opposite to them, but the same persons are not stated to be creditors in the schedule annexed to the petition. The fact of signing the petition without any sum does not prove them to be creditors. On the contrary, as no sum is affixed to their names, and as they do not appear to be creditors named in the schedule, the presumption is they were discovered not to be creditors, after they had signed the petition.

The case of *Stanton v. Ellis*, (2 *Kern.* 579,) is directly the reverse of the present. There the names were placed in blank in the schedule of creditors, without any sum attached to them, and the court held that inasmuch as the debtor had sworn

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that they were creditors, and had not stated the amount of indebtedness, the officer had no means of knowing that two-thirds in amount of the creditors had petitioned for his discharge. In this case the insolvent has sworn that they are not creditors, and the difficulty does not exist.

All the other objections taken to the validity of the proceedings, under the cases above referred to, would not be jurisdictional matters, or would be matters on which the officer was called upon to decide at the hearing; and if so cannot be taken advantage of in a collateral proceeding.

The judgment should be affirmed.

[NEW YORK GENERAL TERM, November 4, 1858. *Davies, Clerke and Ingraham*, Justices.]

 WATSON, executor, &c., vs. CAMPBELL and others.

Where a commissioner of deeds, in a certificate of acknowledgment, certifies to a material requisite to the validity of a certificate, and without which he could not legally take an acknowledgment, viz: that he knows the parties by whom the instrument purports to have been executed—which statement is untrue—such certificate is a nullity, both in respect to the recording of the instrument, and as proof of the execution thereof.

As between the parties, however, the *instrument* would be valid, without any certificate of acknowledgment, upon proof that it was executed and delivered by the grantors.

The court will not interfere with the finding of a referee, upon a question of fact, as to which there is conflicting testimony; unless the clear weight of evidence shows that he has erred.

APPEAL by the defendants, from a judgment of foreclosure, rendered at a special term on the report of a referee.

F. Byrne, for the appellants.

R. Gillen, for the respondent.

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INGRAHAM, J. The defendants move to set aside a judgment of foreclosure entered on the report of a referee. The mortgage appears to have been dated in May, 1852, and acknowledged and recorded in December, 1852. The commissioners, before whom the acknowledgment was made, certify that they know the parties making the same. The defendants set up in their answer that the bond and mortgage were forgeries, and that they never signed or authorized any person to sign the same for them. The mortgage conveyed the whole of lot 58, and the right, title and interest of the mortgagor in lot 59, as described in said mortgage, with another lot. It appears that at the time they only had title to lot 58 and one half of lot 59. Upon the trial, Samuel F. Cogswell, the commissioner before whom two of the mortgagors acknowledged the execution of the mortgage, certified that he wrote and signed the certificate, and that he was certain the parties acknowledged the mortgage before him. That he did not know either of the persons making the acknowledgment, and that the reason why he says the defendants acknowledged it, was because he never signed as commissioner, unless the person signing it acknowledged it before him.

This witness, on examination, stated that he had, since his former examination, been to the house of the defendant, when the whole matter became familiar to him; that he had seen the defendants since that time, and recognized them, and was confident that both of them were the parties who acknowledged the mortgage before him. Upon the evidence the referee found that the mortgage was executed by the defendants.

So far as the certificate of the commissioner is relied on, it is a nullity; both as to the record and as proof of the execution. The commissioner of deeds has seen fit to certify to a material requisite to the validity of the certificate, which, on his examination, he proves to have been untrue, and without which he could not legally take the acknowledgment. Had he done his duty in taking this acknowledgment, he would have required proof of the identity of the persons appearing

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before him, and this defense would not probably have been made. The case shows the impropriety of a commissioner of deeds, in such an acknowledgment, certifying that he knows the parties, without any other knowledge than a mere introduction, or seeing the signature written. He thereby endangers the security, and exposes himself to liability for damages arising therefrom. In the consideration of this case we must lay out of view the certificate of the officer, as neither entitling the paper to be recorded, nor as affording any proof of the execution of the mortgage. As between the parties, however, the mortgage would be valid, upon proof that it was executed and delivered by the defendants, without the certificate of acknowledgment. Cogswell, the commissioner, is the subscribing witness. He testifies to the execution of the paper in his presence by persons he did not then know, but states that he has since seen the defendants, and recognizes them to be those persons. He says, "I swear these two men (pointing to the defendants) now present, came before me and acknowledged the bond and mortgage." Mr. Stuyvesant testifies that he has seen the defendant James Campbell write, and believes the signature to be his.

The mortgage appears to have been drawn by B. C. Ferris, and the money upon it was received by him from the plaintiff's testator, or from her agent. It appears that Ferris was the attorney of Campbell; that Campbell was at Ferris' office to procure a loan on mortgage; that Ferris told him to bring his deed, to search the title. This was in the year 1852. It also appears that Campbell requested Mr. Stuyvesant, another commissioner of deeds, to go to the house and take the acknowledgment of his wife; that he rode with Campbell to his house in Madison street, and there took the acknowledgment.

In opposition to this testimony the defendants proved that two or three witnesses did not think the signature was his; that Campbell, when applied to, about a year since, denied the execution of the mortgage; and that the interest had been paid by Ferris up to the year 1855, and not by the Campbells.

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Upon this testimony, contradictory in its character, the finding of the referee is conclusive. There is nothing in the evidence to warrant us in saying that the referee has not decided correctly or according to the weight of the testimony, and we might leave this case simply on that long established and safe rule that the court will not interfere with the finding of a jury or referee on a question of fact, unless the clear weight of evidence shows that he has erred. But in this case I am disposed to add that the referee has found in accordance with the evidence. How far the credibility of Cogswell was affected by the acknowledgment that he had signed a certificate which was in fact untrue, was for the referee exclusively to decide. He has seen fit to credit his testimony. The testimony of Mr. Stuyvesant is not in any way impeached, either as to the identity of Campbell or the acknowledgment of his wife, and from all the facts in the cause it seems to me that any other finding would have been against the evidence, and against the presumptions which naturally are to be drawn from it. And when we remember that this finding imputes to the parties nothing criminal except the possible misapplication of the money by the attorney, while a contrary decision would involve both a charge of forgery and a charge of perjury as to attorney and witnesses, such a finding is not to be rejected.

I conclude, from all the facts in the case, that the defendants have not received the money, but have been defrauded out of the proceeds of the mortgage. While I concur with the finding of the referee that the defendants executed the papers, the fact that for two or three years the attorney of the defendants paid the interest on the mortgage, and that they were not called on to pay it, leads strongly to the supposition that although he had the money from the mortgagee, he never paid it over to his clients, who had left with him the mortgage; and that the defendants, in the walk of life in which they moved, one of them not signing his name but only making a mark, and neither having heard any thing from the mortgage after it was signed, might have considered it out of ex-

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istence, and might have honestly denied its existence when, in 1856, nearly four years after its execution, they were first notified of any claim upon it.

The suggestion that the mortgage covered property which was not conveyed to the defendants until after the execution of the mortgage, is not correct. On examining the mortgage it will be seen that it only conveys *the right and interest* of the mortgagors in lot 59. If, at that time, the mortgagors only owned one half of that lot, it could not be enforced against the remaining half, and the subsequently acquired title to that half would not be subject to the lien of the mortgage.

The case is a hard one for the defendants. They suffer, however, if they have not received the proceeds of the mortgage, by the fraud of their own agent, and the mortgagee is innocent of any participation in such fraud. Under such circumstances she had the better right and was entitled to be paid.

The report and the judgment are erroneous, however, in holding the whole of lot 59 subject to the plaintiff's mortgage. The mortgage only conveyed the right, title and interest of the mortgagors as it existed at the execution of the mortgage on that lot. The judgment should be so amended as to direct the application of one half of the proceeds of lot 59 to the payment of the plaintiff's mortgage; that the proceeds of the other half be applied to the payment of Wynkoop's mortgage, and any surplus to be paid to James Campbell, subject to a lien thereon for any deficiency in the residue of the property in paying the plaintiff's claim.

Unless the plaintiffs so amend the judgment in ten days, the judgment should be set aside and the report referred back to the referee to correct the same accordingly.

DAVIES, P. J., concurred.

CLERKE, J. I concur, on the ground that it is expedient not to disturb the finding on facts deduced from a conflict of testimony; but I doubt, if the case were before me as a single

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judge without a jury, whether I should have come to the same conclusions as the referee.

Judgment modified.

[NEW YORK GENERAL TERM, November 4, 1858. *Davies, Clerke and Ingraham*, Justices.]

JAMES A. ROOSEVELT *vs.* JOHN T. CARPENTER and others.

A mortgage creditor can, in the lifetime of the mortgagor, either sue upon the bond, or foreclose the mortgage; and he has the right after the death of the mortgagor, at his option, either to sue the heirs of the mortgagor, upon the bond collateral to the mortgage, or to foreclose the mortgage.

The mortgagee is not confined, in the first instance, to his remedy by the mortgage, against the mortgaged premises; but he may, without waiting to exhaust that remedy, resort at once to his remedy upon the bond, which the statute gives him against the heirs, and all the real estate which they take by descent.

Where an action is brought upon the bond, against the heirs of the mortgagor, in the name of the mortgagee, but for the benefit of a grantee of the heirs of the mortgaged premises, proof that it was represented to such grantee, at the time of his purchase, by the grantors, that the premises were only subject to a mortgage specified, the amount of which was deducted from the purchase money, and the balance paid by the purchaser, who understood that there was no other mortgage; when in fact the mortgage accompanying the bond sued on, was also a lien on the premises, at that time, is admissible, and should be received.

THIS is an action brought upon a bond made by John W. Carpenter and Joseph G. Carpenter, both deceased, to James I. Roosevelt, deceased, and Cornelius V. S. Roosevelt, against the heirs of Joseph G. Carpenter, who was the survivor of the obligors, by the plaintiff, who is the assignee of Cornelius V. S. Roosevelt by assignment from him personally and as executor of James I. Roosevelt. The bond was conditioned for the payment of the principal sum of \$2000 and interest. The complaint alleges that the estate of Joseph G. Carpenter has been exhausted, and claims judgment against

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the heirs, who have received more than sufficient real estate, all of which, within the jurisdiction of the court, has been sold. This is admitted. The answer alleges that the bond was accompanied by a mortgage upon the premises number seven White street, in the city of New York, which had been sold by the defendants to one W. H. Johnston, and which were amply sufficient to satisfy the plaintiff's demand, and which it was claimed should be exhausted before recourse was had to the heirs of the obligors. It also sets up payment, but this defense was not proved on the trial. The deed to Johnson conveyed "the right, title and interest" of the grantors, of, in and to the premises, without warranty, or covenants of any kind. The action was referred to a referee, who found for the defendants, on the ground that in equity the defendants were entitled to have the mortgage foreclosed and the land exhausted before recourse should be had to them. From the judgment entered upon his report the plaintiffs appealed.

R. B. Roosevelt, for the appellant. I. The right to sue the heirs of an obligor, when they are named in the bond and have property by descent, is a common law right affirmed by statute.

II. A mortgage accompanying a bond is merely collateral security and does not affect such right. (*Langdon v. Buel*, 9 Wend. 80. *Jackson v. Blodget*, 5 Cowen, 202.)

III. An obligee has a right to sue on the bond, or foreclose the mortgage, at his pleasure, and he will not be controlled by the court, except in a case where there are strong equities against him. (*Jackson v. Hull*, 10 John. 481.)

IV. The equities in this case are all in favor of the suit and against such inference.

V. The property mortgaged clearly was not sold subject to the mortgage, and from the nature of the deed to the purchaser he can have no covenant to protect him.

VI. The proof admitted shows, in spite of the form of the

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deed, which is the customary one, that the premises were to be subject only to one mortgage, which has been paid off, and the proof which would clearly have established this, ought to have been admitted.

VII. The ruling of the referee as to such testimony, was incorrect, as the offer was to prove matters collateral to the written deed and not necessarily included in it. (3 *Phil. Ev.* 1479, 1444. 5 *Gill & John*. 147, 157. *Murray v. Smith*, 1 *Duer*, 425.)

A. Mathews, for the defendants. I. The mortgaged land is the fund primarily liable to pay the plaintiff's debt. (1 *R. S.* 740, § 4. *Halsey v. Reed*, 9 *Paige*, 454, 455. *House v. House*, 10 *id.* 158. *Johnson v. Corbett*, 11 *id.* 270.) (1.) It is well settled in equity that a creditor having two funds or remedies, shall be compelled to resort to that least prejudicial to his debtor. (*Halsey v. Reed*, 9 *Paige*, 453 to 455.) The deed to Johnston conveyed only the defendant's equity of redemption in the lands. The plaintiff seeking the equitable interference of this court must act equitably. If the defendants are compelled to pay the debt they are remediless against Johnston, their grantee. (2.) The statute making mortgaged lands of deceased persons primarily liable to pay mortgage debts, (1 *R. S.* 749, § 4,) and the statute making the heir liable for the debt of the ancestor to the extent of lands inherited, (2 *R. S.* 452, §§ 32 to 55,) are *in pari materia*, and to be construed together. •(1 *Kent's Com.* 433. *Sedgwick on Statute Law*, p. 247.)

II. The proffered evidence, of statements made by the agent of the defendants, was properly excluded by the referee. (1.) They are wholly *foreign* to the *plaintiff's* right of action or his remedy, and are totally immaterial. (2.) There being no pretense of *fraud*, they would be inadmissible even in an action between Johnston and the defendants. (3.) They were not within the scope of the authority of the agent. The

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principal herself (the guardian) had no power to make them to bind the defendants, and she could confer none upon her agent. (*N. Y. Life Ins. and Trust Co. v. Beebe*, 3 *Seld.* 364.) (4.) If there was any understanding, representation, statement or agreement made by authority, all were merged and extinguished in the deed, and (in the absence of fraud) the deed could not be impeached or contradicted by parol evidence, even in an action by Johnston against the defendants. (*Howes v. Barker*, 3 *John.* 506. *Houghtaling v. Lewis*, 10 *id.* 297. *Renard v. Sampson*, 2 *Kern.* 561.) (5.) Johnston, himself, could avail himself of the alleged misstatement only by canceling the deed and surrendering the lands to the defendants, which he cannot do in this action. (*Moyer v. Shoemaker*, 5 *Barb.* 319.)

By the Court, SUTHERLAND, J. I think that the conclusion of law, found by the referee in this case, was erroneous, and that the judgment entered upon his report should be reversed, and that there should be a new trial with costs to abide the event.

It is true, that as between the personal representatives and the heirs of Joseph G. Carpenter, the deceased surviving obligor, the mortgaged premises were primarily liable for the mortgage debt. (*Halsey v. Reed*, 9 *Paige*, 453–55. *Johnson v. Corbett*, 11 *id.* 270;) but this is an action by the assignee of the obligees of the bond, against the heirs of the surviving obligor, and all the questions arise between those parties. The cases in 9th and 11th *Paige* have no application.

The provision of the revised statutes, (*vol.* 1, *p.* 749, § 4,) altering the common law, is a regulation as between the heirs and the personal representatives; and in my opinion it in no way affects or qualifies the direct liability of the heirs by the provision, 2 *R. S.* 452, § 32, to the creditor. The bond represents the debt, the principal; the mortgage is but collateral.

The right of the obligee or holder of the bond to sue the

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obligor, in his lifetime, is no more complete or perfect than his right to sue the heirs of the obligor, after his death, in a case in which the heirs are liable by the statute. The mortgage creditor can, in the lifetime of the mortgagor and obligor, at his option, either sue the bond or foreclose the mortgage. I do not see why he has not the right, after the death of the mortgagor and obligor, at his option, either to sue the heirs when liable for the debt, or to foreclose the mortgage.

In this case it appears that not only the mortgaged premises, but other real estate described in the complaint, exceeding in value the plaintiff's demand, descended to the heirs. Their liability by the statute, is to the extent of the estate, interest, and right in all of the real estate which shall have descended to them; not merely to the extent of their estate and interest in the mortgaged premises. The mortgaged premises were liable to the mortgage creditor for the debt, *by the contract—the mortgage*—and all the real estate of the intestate, which descended to the heirs, including the mortgaged premises, or their proceeds if aliened by them before action, (2 R. S. 454, §§ 47, 48, 49,) were also liable to the mortgage creditor, both at law and in equity, (*Laws of 1837, ch. 460, § 73,*) *by the statute*.

I find neither reason nor authority for holding that the mortgage creditor is confined in the first instance to his remedy given by the mortgage against the mortgaged premises; and that he cannot pursue the remedy which the statute gives him against the heirs and all the real estate which they take by descent on the bond, until he has first exhausted his remedy under the mortgage.

I do not see why the equities between the heirs and personal representatives of the intestate should limit the creditor's right of action against the heirs; and I find nothing in the statute confining him to the mortgage, in the first instance.

For these reasons alone—and this is putting the case upon strictly legal principles—I think the report of the referee was

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erroneous, and that the judgment entered on it should be set aside.

But admitting that this suit was brought for the benefit of Johnston, the grantee of the heirs of the mortgaged premises, it appears to me that all the equities of the case are in favor of the plaintiff. The deed of the heirs did in fact, of course only convey the equity of redemption; but the premises were not conveyed by them, subject to the mortgage; and the plaintiff offered to prove that it was represented to Johnston by Thomas E. Allen, the agent of John T. Carpenter, the heir and grantor of full age, and of May Carpenter, the guardian of the infant heirs, the other grantor, at and prior to his purchase, that the premises were only subject to a mortgage to the Merchants' Insurance Co. for \$2000, and to no other; which was deducted from the consideration money, \$4000, to be paid by Johnston for the premises; the balance paid by him; and that \$4000 was the price and value of the premises; and that Johnston understood that there was no other mortgage on the premises. It was not necessary, probably, for the plaintiff to make this offer, or to give the evidence involved in it; but it appears extraordinary that the referee should have excluded the evidence; with the admission before him that the action was prosecuted on the retainer and at the expense of Johnston; and should then have dismissed the plaintiff's complaint, on the ground that he had no remedy against the heirs until he had exhausted his remedy under the mortgage.

As between Johnston and the heirs, assuming this offer to have been made in good faith, the equities were all on the side of Johnston. He offered to prove, in effect, that he had paid the money to the heirs to pay the mortgage. Why should they not pay it? Ought they to keep the money, and compel him to pay it again? It appears to me, had the evidence been received, it would have been an answer (if any was necessary) to the equitable position insisted on by the defendants and held by the referee, that the plaintiff must

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first resort to the mortgage. The matters offered to be proved, would not have contradicted the deed, but were collateral to, and consistent with it.

Judgment reversed, and new trial granted.

[NEW YORK GENERAL TERM, November 4, 1858. *Davies, Clerke and Sutherland, Justices.*]

MARY E. THOMPSON and others vs. EDWARD G. THOMPSON.

A testator, by his will, gave to each of his children one of the shares into which he had directed his estate to be divided, the interest and income of which was to be applied to their support and education during their minority, and upon his son or sons, respectively, arriving at the age of 21 years, their shares were to be paid over to them. The will then directed that the principal sums bequeathed and devised to his children should *vest in them*, respectively, when and as they should respectively arrive at *the age of twenty-one, and not before*; provided that if either of his children should die before attaining the age of 21, leaving issue, such issue should stand in its parent's place, had the latter lived to attain the age of 21. In case of the extinction of all the lineal descendants of the testator at any time before all or any of his estate so devised should have vested in interest, the testator gave the same, or so much as might not then have vested in interest, to his father, if living; if not, then to his uncle, if living; if not, then to the heirs male of his uncle. The entire estate left by the testator consisted of personal property. He died in July, 1835, leaving a widow, a daughter C., and two sons, A. F. and E. G. The said A. F. died in April, 1846, aged nearly thirteen years, and leaving no issue. C. the daughter, and E. G. the other son, were now each of the age of 21 years and upwards. The widow of the testator was still living.

- Held*, 1. That the share of A. F. vested in him, *in interest*, on the death of the testator; and that having so vested on his death without issue, the same was to be distributed in equal shares to his mother and surviving brother and sister, under the statute of distributions; to take and hold absolutely, in their own right.
2. That by the declaration, in the will, that the principal sums bequeathed to the children should vest in them, respectively, when and as they should arrive at the age of 21, and not before, the testator must be presumed to have meant *vest in possession*.

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3. That the limitation over to the father, and uncle of the testator, and in case of the uncle's death to the male heirs of the uncle, by its very terms could not take effect until after the expiration of three lives in being at the death of the testator, and was therefore void.

THIS case was submitted, for the construction of the will of the late Edward G. Thompson. The testator, by his will, after directing the sum of \$3000 to be appropriated out of his estate, by his executors and trustees, for the support and maintenance of his wife and children, and the education of his children, for and during the first year after his decease, further orders and directs, that at the expiration of one year after his decease, his whole estate shall be divided into a number of shares, greater by one than the number of children whom he should leave him surviving; that his executors and trustees should set apart one of said shares, and hold and invest the same, and pay over the interest and income thereof, to his wife during her life, or so long as she should remain his widow, and no longer. He then gives, devises and bequeaths to each of his children who might survive him one of the shares; and in case his wife should die before him, or if she should survive him, then upon her death or re-marriage, he gives the share so directed to be set apart for her use, to any son or sons who should survive him, share and share alike. In relation to the share or shares of the sons, the testator directs his executors and trustees to hold, invest and improve the same, and the surplus accumulations thereof, and out of the interest and income of their respective shares to pay such amount or amounts as may be necessary or proper for the maintenance and support of the sons respectively, and for his or their education for any profession or occupation which he or they may respectively choose, after he or they shall have respectively attained the age of fourteen years. And upon his son or sons respectively arriving at the age of 21 years, the testator directs that his executors and trustees shall pay over to his sons their respective shares, to be thenceforth had and holden by them and their respective heirs, executors and administrators forever.

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The testator directs the share or shares of his daughter or daughters to be held by his executors and trustees, in trust for them respectively, as follows: until their marriage or arrival at the age of 21 to pay out of the interest and income of their respective shares, such amount or amounts as shall be necessary or proper for their maintenance, support and education in a respectable and proper manner; the surplus of such interest or income to be added to her or their respective shares, and to be subject to the same trusts as are therein declared with regard to the principal; and when, and as, his daughter or daughters attain the age of 21 years, or marry, during the residue of their respective lives, to pay to her or them respectively, for her or their respective sole and separate use, the income and interest of their respective shares and of any surplus accumulations thereof. Upon the death of his daughter or daughters respectively, to pay over their respective shares or portions, and the surplus accumulations thereof, to such person or persons, and in such proportions and shares, and for such estate, and under such limitations and restrictions as she or they shall respectively, by any instrument in writing executed in the presence of two subscribing witnesses, in the nature of a last will and testament, order, limit or appoint; but such appointment shall be in favor of their respective issue only, if they die leaving issue; and if they die without leaving issue, such appointment must be in favor of some one or more of the lineal descendants of the testator; and if his daughter or daughters should die without having exercised the power of appointment at all, or in the manner authorized, their shares, with the accumulations thereof, are to be paid over to their issue respectively; and upon the death of a daughter without issue, and without having exercised the power of appointment, then her or their respective shares shall fall into and form a part of the residuary estate. The testator then directs his executors to invest all and every the sum or sums, directed to be held and invested by them, in bonds and mortgages, or public or private stocks within the state of New

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York, or in stocks of the United States; and declares that the principal sums bequeathed and devised to his children shall vest in them respectively, when and as they respectively arrive at the age of 21 years and not before; provided that if any of his children should die before attaining the age of 21, leaving lawful issue, such issue shall stand in the place his or their parent would have been entitled to, had the parent lived to attain the age of 21 years; and in case of the extinction of all the lineal descendants of the testator, at any time before *all or any of his estate* so devised and bequeathed shall have vested in interest, the testator gives the same, or so much as may not then have vested in interest, to his father, Abraham G. Thompson, if living; if not, then to his uncle Jonathan Thompson, if living; if not, then to the heirs male of his uncle Jonathan Thompson. The testator appoints his father, Abraham G. Thompson, and four others named in the will, executors and trustees.

The testator died July 23d, 1835, leaving him surviving his widow, Mary E. Thompson, his daughter Cornelia, now Mrs. Pennoyer, and two sons, Augustus Frederick, and Edward G. Thompson the defendant. The said Augustus Frederick died on the 22d day of April, 1846, aged twelve years and eleven months, leaving no widow and no children or representative of a child. His mother survived him and is now living. The said Cornelia Pennoyer and Edward G. Thompson are each of the age of 21 years and upwards, and the only brother and sister of the said Augustus Frederick. The said Cornelia has three children now living, her lawful issue by a former husband, Thomas E. Quimby deceased; all of whom are infants under the age of 21 years; and has no other lawful issue now living.

The entire estate left by the testator consisted of personal property.

The bequest to his wife of the income of one share of his estate, during her life or re-marriage, is declared by the testator to be in full satisfaction and in lieu of her dower and

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distributive share in his estate ; and she accepted such provision in full satisfaction of her dower and distributive share in the estate.

The questions arising upon the above state of facts were :

1. To whom is the share of the estate, which would have belonged to Augustus Frederick had he lived, now to be distributed ?

2. In what proportions is such distribution to be made, and are the distributees to take the same in their own right severally, or how otherwise ?

C. A. Seward, for Mary E. Thompson and C. R. Pennoyer

E. P. Cowles, for E. H. Quimby and others.

Samuel Blatchford, for E. G. Thompson, trustee, &c.

By the Court, SUTHERLAND, J. I suppose the share or legacy of Augustus Frederick vested in him in interest on the death of the testator, notwithstanding the declaration in the will, that the principal sums bequeathed to the children should vest in them respectively, when and as they should respectively arrive at the age of 21 years, and not before ; and that having so vested, on his death without issue, the same is to be distributed in equal shares to his mother and surviving brother and sister, under the statute for the distribution of the estates of intestates, to take and hold absolutely in their own right.

By the declaration in the will, that the principal sums bequeathed to the children shall vest in them respectively when and as they arrive at the age of 21 years, and not before, the testator must be presumed to have meant, *vest in possession*. Such declaration thus construed, is consistent with the vesting of the shares in interest in the testator's sons on his death ; and so is the declaration, that in case any of the children of the testator should die before arriving at the age of 21 years leaving issue, such issue shall stand in the place of the deceased

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parent; for the statute for the distribution of the estates of intestates would place such issue in the same position.

There is no limitation over of the sons' shares in case of their death without issue, except the limitation over to the father of the testator, if living; in case of his death, to the uncle of the testator; in case of his death, to the male heirs of the uncle, upon the extinction of *all* the lineal descendants of the testator at any time before *all* or *any* of the estate devised and bequeathed shall have vested in interest.

This limitation over, by its very terms, could not take effect until after the expiration of three lives in being at the death of the testator, and is therefore void. If valid, I do not see why it would not suspend the absolute ownership of the share of Augustus Frederick for the further term of the lives of his surviving brother and sister.

I at first thought that the share of Augustus Frederick was to be distributed, as a reversion undisposed of by the testator, on the death of Augustus Frederick without issue; but upon the whole, I think the direct absolute bequest to him of his share, without any valid limitation over, except perhaps to his issue, in case of his death leaving issue, must control; and that the above is the better and more correct construction of the will, so far as the construction of the will is called for by the questions submitted to us.

I do not however think these questions so free from doubt as to have entirely justified eminent counsel in submitting this case to us without argument, or even points.

[NEW YORK GENERAL TERM, October 2, 1858. *Davies, Ingraham and Sutherland*. Justices.]

GOULDING *vs.* DAVIDSON.

A married woman, after her coverture ceases, cannot make a valid legal promise to pay a debt which she incurred during coverture.

The decision of the superior court of New York, in *Watkins v. Halstead*, (2 *Sandf. Sup. C. Rep.* 311,) approved

A mere moral obligation is not a sufficient consideration to support a promise, unless it is founded on a previous *legal* liability.

THIS action was brought upon three promissory notes, made by the defendant during her coverture, and also for a balance due upon an account, for merchandise sold to her during her coverture. The complaint alleged that the promissory notes were for goods sold and delivered to defendant at her request, "and solely on her credit and responsibility, she being then a trader doing business in her own name, and for her own personal benefit and advantage, she holding herself out to be an unmarried woman;" that she now alleges that she was then married, but that after the sale, &c., and after the death of her alleged husband, "she, in consideration of the premises, and of her duty in that behalf, and of the moral obligation resting upon her to pay," promised to pay. The demurrer was "that the said amended complaint does not contain facts sufficient to constitute a cause of action."

The court, at special term, allowed the demurrer, and the plaintiff appealed.

A. Boardman, for the appellant. I. The complaint sets forth six distinct causes of action, in six distinct counts. (*See* § 150, and *Rule* 86.) The demurrer is that the complaint "does not contain facts sufficient to constitute a cause of action." If the facts set forth in any one of the counts constitute a cause of action, there must be judgment for the plaintiff.

II. There can be no doubt that the facts set forth in the 1st, 2d, 3d and 4th counts, do as to each count state a good cause of action. They contain no admission that the defendant was a married woman, nor does any part of the complaint

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Each of these counts states a good cause of action in a well settled legal form.

III. The sixth count was added as an amendment to the original complaint after the original answer of the defendant was served, setting up coverture, and is adapted to meet any proof she may offer of her allegations in that behalf. The promise there alleged is one which constitutes a good cause of action, whether at the time of making any of the contracts in the previous counts stated she was married or unmarried. (1.) The moral obligation to pay a debt contracted during coverture, at the special request, for the personal advantage of a married woman, or under any circumstances imposing on her a moral obligation to pay, is a good consideration for an express promise to pay. (*Vance v. Wells*, 8 *Ala.* 399. *Barnes v. Hedley*, 2 *Taunt.* 182. *Lee v. Muggeridge*, 5 *id.* 36. *Ehle v. Judson*, 24 *Wend.* 99. *Geer v. Archer*, 2 *Barb. S. C. R.* 425. 2 *Greenl. on Ev.* 93. 21 *Am. Jurist*, 276. *Chitty on Con.* (ed. of 1842,) 46, 48. 1 *Chitty's Black.* 443, 359. *Hammond v. Hopping*, 13 *Wend.* 505. *Miller v. Hull*, 4 *Denio*, 104. *Rice v. Welling*, 5 *Wend.* 595. *Early v. Mahon*, 19 *John.* 150.) (2.) In this case all the elements of obligation exist. The defendant was "a trader, doing business in her own name," and for "her own personal benefit and advantage." She held herself out to be an unmarried woman, was trusted "solely on her credit and responsibility;" and after the death of her husband "she, in consideration of the premises, and of her duty in that behalf, and of the moral obligation resting upon her to pay," promised to pay.

D. P. Wheedon, for the respondent. I. A note made by a married woman during the life of the husband, and given in payment of merchandise sold during her coverture, is void. (See *Watkins v. Halstead*, 2 *Sandf. S. C. R.* 311, 1 *Parsons on Cont.* 358, 359, 360, 361, and notes. *Geer v. Archer*, 2 *Barb. S. C. R.* 420. *Nash v. Russell*, 5 *id.* 556. *Lloyd v. Lee*, 1 *Stra.* 94.)

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II. If the original contract was void, a subsequent promise, without a consideration, would be void also. A moral obligation alone is not sufficient to change a contract originally void, and make it valid and binding. (*See cases above cited.*)

By the Court, CLERKE, J. The counsel for the plaintiff contends, because the complaint contains six distinct counts, in each of which a separate contract or indebtedness is alleged, without an allusion, in any separate count, to the coverture of the defendant, that the demurrer should have been overruled. But, subjoined to the last count, it is expressly stated "that after the sale and delivery of the said goods and after the making of the said notes, and all the said contracts named, and on or about the 1st September, 1854, her said alleged husband died; and she has not since intermarried." And then it goes on to state that after his death, and while she was sole, she promised, in consideration of the moral obligation, to pay this indebtedness. This, taken in connection with the whole language of the last count, is a sufficient admission of the coverture, applicable to all the counts; and indeed, if I rightly recollect, it was stated that the complaint was framed for the purpose of bringing up the question on demurrer, whether a woman, after her coverture ceases, can make a valid legal promise to pay a debt, which she incurred during coverture. And what I stated below, I now state, after further consideration, that I deem the decision of the superior court in *Watkins v. Halstead*, (2 *Sandf. S. C. R.* 311,) to be in accordance with the law of this state, on the subject of a promise founded on a mere moral obligation. The principle lying at the foundation of this law, is, that a mere moral obligation is not a sufficient consideration to support a promise, unless it is founded on a former *legal* liability. It has, undoubtedly, been incidentally *asserted* in some of the cases, to which the counsel for the plaintiff refers, that a debt incurred by a woman during coverture, may constitute a sufficient consideration for a promise after the coverture has ceased. But when

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these *dicta* were uttered, the question was not directly before the court, and formed no part or element of the adjudication.

The opinion of Judge Vanderpoel, in *Watkins v. Halstead*, in which this question was expressly presented, and the only one in the cause, is so complete that it is unnecessary to pursue the subject any further.

I think the judgment of the special term should be affirmed with costs.

NEW YORK GENERAL TERM, November 4, 1858. *Davies, Clerke and Ingraham, Justices.*]

 GASPER vs. ADAMS and others.

Facts may be averred, in a pleading, according to their legal effect; but facts appearing on the trial, directly different from those averred, will be deemed a variance, although, if properly pleaded, they also would have constituted a good defense.

In an action upon a promissory note, the answer set up the defense of usury on the part of the plaintiff in exacting more than seven per cent on a loan of money, or on giving a further day of payment. The proof was that the makers, being indebted to the plaintiff upon a promissory note, which they were unable to pay at maturity, and being pressed for payment, requested an extension of the time of payment, which the plaintiff's agent refused to grant, unless the makers would give a new note, with two additional indorsers, and pay certain of the said agent's expenses in going to see the makers and of waiting for the new note. This was agreed to, and the note sued on was given for the amount of the principal of the old note, and the expenses of said agent; *Held* that there was a fatal variance between the answer and the proof.

APPEAL from a judgment rendered upon the report of a referee. The action was upon a note made on the 30th of January, 1855, by the defendants James D. Adams and Jesse F. Adams, by which they jointly and severally promised to pay to the order of Asahel Gooding, \$410.69, with interest, sixty days after date. This note was indorsed by Asahel Gooding, Phineas Kent and Lemuel Castle, the other defend-

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ants. The plaintiff sued as indorsee; and the complaint alleged presentment and demand of payment, non-payment, and notice to the indorsers. The answer admitted the making, indorsement and delivery of the note, but alleged that previous to the execution thereof, it was corruptly and against the form of the statute, agreed by and between the plaintiff and the defendants, that the plaintiff should lend and advance unto the defendants the sum of \$396.69, and that the plaintiff should forbear and give day of payment thereof to the defendants for sixty days, and that the defendants, for the loan of the said sum of \$396.69, and for giving day of payment thereof as aforesaid for the time aforesaid, should give and pay to the plaintiff at the expiration of the 60 days, the sum of \$14, being more than lawful interest for the same, making, together with the said sum of \$396.69 so to be lent and advanced by the plaintiff to the defendants the sum of \$410.69 in the said note mentioned; and also that the defendants should pay to the plaintiff interest on the said sum of \$410.69 from the 30th day of January, 1855, until the time of the payment of the said sum of \$410.69, in the said note mentioned.

And for a further answer the defendants alleged that the said sum of \$14 so agreed to be given and paid to the plaintiff for the purpose aforesaid, and for the interest of the said sum of \$410.69 reserved and made payable to the plaintiff by the condition of the note, exceeds the rate of \$7 for the forbearing of \$100 for one year, contrary to the form of the statute in such case made and provided; by means whereof and by force of the said statute the said writing and promise was wholly void.

The referee found the facts to be as follows, viz: The firm of Gasper & Co., consisting of the plaintiff and four others, doing business in New York, were the holders of a promissory note, dated 1st January, 1855, made by the defendants James D. Adams and Jesse F. Adams and indorsed by the defendant Gooding, for \$396.69, payable in 30 days with interest. This note was given for goods sold by Gasper & Co. to James D.

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Adams. It matured the 2d February, 1855, and was payable at the Bank of Canandaigua, New York, but was not paid. The amount due upon it at maturity was \$399.22. After the maturity of the note, the agent of Gasper & Co. called upon James D. Adams, at his residence in Ontario county, for payment. Adams was unable to pay, and requested an extension of time of payment, which the agent refused to grant, unless Adams would agree to give a new note with two additional indorsers and pay certain of the said agent's expenses in going to see him, the said Adams, and which should accrue during the time he should remain in waiting for the new note with such additional indorsers. To this Adams agreed, and thereupon the note set forth in the complaint was made, the same being antedated to the 30th January, 1855, and the consideration of it being made up between the aforesaid agent and said Adams, as follows, viz: Principal of the old note, \$396.69; expenses of the agent, \$14; making in all, \$410.69. The parties had accidentally omitted to include the interest on the old note in their computation for the new one. The whole amount of the agent's expenses which Adams agreed to pay was \$18; but \$14 only of the same were inserted in the computation for the new note or embraced in it. The note so agreed upon was executed by the makers and indorsers thereof, and is the same note set forth in the complaint. The indorsers received no consideration for their indorsements of the note. That the amount now due upon the note, for principal and interest; was \$449.01.

Upon the foregoing facts, the referee held as matter of law, that the contract of usury set up in the answer was not proved as therein charged. He further held that the defendants under their answer could not avail themselves, in this action, of the facts so as aforesaid proved, upon the ground that the variance between the pleadings of the defendants and the proof was fatal; and therefore determined that the plaintiff was entitled to judgment for the sum of \$449.01, with costs.

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C. A. Seward, for the appellants.

E. & E. F. Brown, for the respondent.

By the Court, CLERKE, J. As the defendants have failed to prove the facts set forth in the answer, and have neglected to ask for leave to make their answer conform to the facts, it is unnecessary for us to consider whether the conclusions of the referee, from the facts proved, were correct. Facts, undoubtedly, may be averred in a pleading according to their legal effect; but facts directly different from the facts averred, will, in all cases, be deemed a variance; although, if properly pleaded, they also would have constituted a good defense.

I think the referee was right in deciding that there was a variance between the answer and the proof, and that the defendants failed to substantiate their defense.

Judgment affirmed with costs.

[NEW YORK GENERAL TERM, November 4, 1858. *Davies, Clerke and Ingraham*, Justices.]

GOULD *vs.* MORING.

H. signed an agreement, by which he promised to pay to A. the rent of certain premises. This agreement was also signed by the defendant, as "security," without any consideration being expressed. *Held* that the case fell directly within the rule laid down by the court of appeals, in *Brewster v. Silence*, (4 *Seld.* 207;) and that, the consideration not being expressed in the undertaking of the defendant, it was void by the statute of frauds.

APPEAL from a judgment rendered at a special term, after a trial at the circuit. The action was brought to recover \$160.50 for rent due on the 1st of May, 1856, by Edward Heilberth, on the following agreement, to wit:

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"I have this day rented the office No. 2 Hanover street, of Thomas Andrews, treasurer, until the 1st May next, for the sum of three hundred and twenty-five dollars, payable one half 1st of February, the other half 1st May next. Messrs. Hughes & Andrews reserving the use of their desk in said office without any additional charge to them of fire or clerk hire.

New York, October 23, 1855. EDWARD HEILBERTH.

Security—H. E. MORING."

The plaintiff averred in the complaint, that in pursuance of said agreement, Heilberth entered into the possession of the premises, and used and enjoyed the same for the period mentioned in said agreement. And that the defendant undertook and promised, and did become pledged, liable and bound to said Andrews for the fulfillment of said agreement by Heilberth, and to pay said rent, and that the sum of \$162.50 for the one half part of the said rent due the 1st May, 1856, became due and payable by the said Heilberth, and that the same remains due and unpaid. That notice of the default of said Heilberth was given to the appellant. And also that the said agreement and guaranty, and all advantage and benefit thereof, was assigned to the plaintiff. The defendant denied in his answer all the allegations in the plaintiff's complaint, except the signing of his name under the word "security" in said agreement

On the trial, the defendant's counsel moved that the complaint be dismissed, upon the following grounds: 1. That the security or guaranty of the defendant for the payment of rent, or for the faithful performance of the contract by Heilberth, is void, there being no consideration expressed upon which it was made. 2. That the security of the defendant is void for want of consideration.

The justice denied the motion to dismiss, and instructed the jury that the defendant was liable, and directed them to find a verdict for the plaintiff, for the amount claimed, and interest, amounting to \$179.96; for which amount a verdict and judgment were rendered.

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Henry Alker, for the appellant.

Tracy, Wait & Olmstead, for the plaintiff.

By the Court, DAVIES, P. J. The case of *Hanford v. Rogers*, (11 Barb. 18,) decided in 1851, in the general term of this district, is certainly an authority for maintaining the ruling at the circuit.

In that case the guaranty of a bond expressing no consideration was held not to be within the statute of frauds. It was executed at the time of the bond, and was held to be a part of the same transaction. It was as in this case, one transaction, executed at one time, and for one consideration, and the court say that "none of the dangers against which the statute of frauds was designed to guard could arise here."

But the case of *Brewster v. Silence*, (4 Seld. 207,) since decided by the court of appeals, is in conflict with that decision, and *Hanford v. Rogers* must yield to the higher authority.

In *Brewster v. Silence* the note and guaranty were given at the same time, on the same piece of paper, and on the faith of both, property was parted with by the receiver. The court of appeals say "the note and guaranty are not one and the same thing. The note is the debt of the maker—the guaranty is the engagement of the defendant, that the maker shall pay the note when it becomes due. A joint action will not lie against them both. They are not the same but different and distinct contracts. If we give effect to the statute, we must treat the guaranty as void for want of expressing on its face the consideration."

In this case the defendant undertakes, as security for the tenant; that is, that he will pay if the defendant does not. A joint action will not lie against them both; they are not the same, but different and distinct contracts. (*De Ridder v. Schermerhorn*, 10 Barb. 638. *Allen v. Fosgate*, 11 How. Pr. R. 218.) It follows therefore, that the present case falls directly within the rule laid down in *Brewster v. Silence*, and,

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the consideration not being expressed in the undertaking of the defendant, it is void by the statute of frauds, as the same exists in this state. The judgment appealed from is reversed, and a new trial ordered; costs to abide the event.

[NEW YORK GENERAL TERM, November 4, 1858. *Davies, Clerke and Ingraham, Justices.*]

RIDER and others vs. POND.

The plaintiffs, being manufacturers of oils and varnish, entered into an agreement with R. & Co. by which the plaintiffs undertook to increase the capacity of their works, so as to produce double the quantity of oils and varnish then manufactured, and when they were thus prepared to extend their business, R. & Co. agreed to advance them \$10,000, to be refunded as thereafter provided. The oils and varnish were to be consigned to R. & Co. for sale, and after paying advances, commissions &c., they were to retain sufficient to refund said advance of \$10,000. As a further security for the \$10,000 the plaintiffs agreed that when the same was advanced they would deliver to R. & Co. bills of sale of the machinery in the oil works, and assign a policy of insurance upon the factory and machinery, to the amount of \$10,000. Subsequently the plaintiffs transferred to the defendant all their right and interest in the said agreement and its stipulations, except the receipt of the \$10,000. The defendant thereupon assumed all the obligations of the plaintiffs in their contract with R. & Co., and agreed to build and fit up the factory, and to make a bill of sale to R. & Co. on the said factory, for the \$10,000 to be advanced by R. & Co., and that R. & Co. might pay over the \$10,000 to the plaintiffs, for their own use. In an action for a breach of this agreement, the breach assigned was that the plaintiffs had requested the defendant to procure a policy of insurance for the sum of \$10,000 and assign the same to R. & Co., and had also requested him to execute and deliver to R. & Co. a bill of sale of the machinery in the factory as security to them for the sum of \$10,000, so to be advanced by them; which the defendant had refused to do. *Held*, that in the absence of any averment, or proof, that the plaintiffs had been damnified in any way by the breach of the defendant's contract; or that in consequence of such breach R. & Co. had refused to pay them the \$10,000, the action would not lie.

ON the 30th of May, 1850, the plaintiffs, being manufacturers of oils and varnish in Brooklyn, entered into an agree-

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ment with Roberts & Low, merchants of London, doing business under the firm of E. G. Roberts & Co. The parts of the agreement material to the present case are as follows: The plaintiffs agreed to increase the capacity of their works, so as to produce double the quantity of material then being manufactured by them, and when they were thus prepared to increase the quantities of oil manufactured, the said firm of E. G. Roberts & Co. agreed to advance them \$10,000 in cash, to be refunded as thereafter provided. The manufactured articles were to be consigned to said firm of E. G. Roberts & Co. for sale, and after paying advances, commissions &c., they were to retain sufficient to refund said advance of \$10,000. The plaintiffs agreed that as a further security for the payment of said advance of \$10,000, which they designed to expend in increasing their works as above mentioned, they would, when the *same was advanced*, assign to Roberts & Co. a policy of insurance in at least that amount, upon the factory and machinery, and keep the same thus insured *until* the said \$10,000 was refunded. And they also agreed, *on payment* of said \$10,000, to execute and deliver to Roberts & Co. a bill of sale of the machinery in the factory to that amount, to be held by them as a further security until the said sum of \$10,000 was refunded. On the 23d of July, 1850, the plaintiffs transferred to the defendant all their right, title and interest, in and to the said agreement and its stipulations, except the receipt of the \$10,000 mentioned in an agreement annexed, executed by the defendant, of the same date, so that the defendant might do all things in the premises, and receive all moneys under said contract, except the sum of \$10,000.

The defendant, thereupon, by a simultaneous agreement between the plaintiffs and himself, assumed all the obligations of the plaintiffs in their contract with Roberts & Co., and further agreed with the plaintiffs to build and fit up the factory and "to make a bill of sale to said Roberts & Co. on said oil factory, for \$10,000, to be advanced by said Roberts & Co.; said bill of sale to be in accordance with said agreement,

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and when said bill of sale is made, I agree that said Roberts & Co. may pay over said \$10,000 to W. Rider & Brother, [the plaintiffs,] to be used by them for their own use and benefit, and without any account to me." It was for an alleged breach of this last agreement that this suit was brought, and the plaintiffs claimed damages to the amount of \$10,000.

The breach alleged in the complaint was that the plaintiffs had requested the defendant to procure a policy of insurance for the sum of \$10,000, and assign the same to Roberts & Co., and had also requested him to execute and deliver to Roberts & Co. a bill of sale of the machinery in said factory, to the amount or sum of \$10,000, as security to said Roberts & Co., for the amount or sum of \$10,000, to be advanced by them as aforesaid, which the defendant had refused to do; whereupon the plaintiffs had sustained damage to \$10,000.

The defendant denied that the plaintiffs had sustained any damage by reason of his neglect or default. The case was tried at the circuit, and on proof of these agreements, and that Roberts & Co., and Robbins had assented to the assignment of the contract to the defendant, and that the defendant took possession of the works and made the improvements contemplated by the contract, the plaintiffs rested their case. The defendant moved to dismiss the complaint, which motion was granted, and the plaintiffs excepted, and the judge directed the exceptions to be heard in the first instance at the general term.

W. H. Leonard, for the plaintiffs.

H. H. Stuart, for the defendant.

By the Court, DAVIES, P. J. The plaintiffs seek to recover damages from the defendant for his alleged breach of his contract with them. This action has nothing to do with his failure to perform the contract with Roberts & Co., if any such

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failure has occurred; nor is it to recover for any damages which Roberts & Co. have sustained.

The agreement with the plaintiffs was that, he, the defendant, would make a bill of sale to Roberts & Co. on said oil factory, for \$10,000, to be advanced to said Roberts & Co. according to the agreement, which was, to make the advance to the plaintiffs. Roberts & Co. make no complaint or demand on the defendant to make such bill of sale to them, and how do the plaintiffs show they are damnified by the defendants' omission to make the bill of sale to Roberts & Co.? I have looked in vain, through the complaint, for any allegation of injury to them, or any proof that they have sustained any damage by such breach. I do not comprehend how a plaintiff is entitled to recover damages for a breach of an agreement, unless such damage is alleged in the complaint and admitted by the answer, and if, as in this case, it is denied in the answer, without proof of the damage. The rule laid down in *Williams v. Benton*, (13 *Louis. Rep.* 404,) and quoted approvingly in *Sedgwick on Damages*, p. 67, is "that the damages which a party can recover, on a breach of a contract, are those which are incidental *and caused* by the breach, and may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract." Now it is manifest that the plain and obvious agreement of these parties was that the bill of sale was to be given to Roberts & Co. as security for the \$10,000 to be advanced by them to the plaintiffs, and the object of the covenant on the part of the defendant was to insure the security to Roberts & Co., on such advances, which the plaintiffs had agreed to give them when the advance should be made, and not before, or for any other purpose. Shankland, J., in his opinion in the Court of Appeals in this case, says: "These securities in the hands of Roberts & Co., without the money being advanced upon them, would have been nullities." Can it be said that the plaintiffs have sustained any damage by the defendant's not doing an act which would be a nullity? It is not averred or proven

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that the plaintiffs have been damnified in any way by the breach of the defendant's contract. If they have received the \$10,000 from Roberts & Co., and the latter have not received the security to which they were entitled, it is for them to complain. If the plaintiffs have not received the \$10,000, which, it is clear all the parties agreed and contemplated should be paid to them by Roberts & Co., and secured to the latter by the defendants, they should have so averred and proved, and that such failure was caused by the breach of the covenant on the part of the defendant. Then a good cause of action would have been established against him, and the plaintiffs would have been entitled to recover the damages sustained by them.

We do not see that they have sustained any damage by such omission of the defendants. The motion to dismiss the complaint was properly granted, and the complaint must be dismissed with costs.

[NEW YORK GENERAL TERM, November 4, 1858. *Davies, Clerke and Ingraham, Justices.*]

 BAYAUD & BERARD vs. FELLOWS.

A receiver should never be appointed over a mortgagee of chattels in possession, where he swears to a balance due him: much less where the plaintiff himself states such balance, and that the pledge is not an inadequate security for such balance.

Where there is no allegation of danger, or irresponsibility on the part of the mortgagee, he will not be restrained, by injunction, from selling the same, to reimburse himself for his advances.

Nor will a receiver be appointed, to take the property out of his possession and make sale thereof, and keep the proceeds, until the accounts are finally settled between the parties.

Neither will the fact that the mortgagor has a claim against the mortgagee, arising out of a different transaction, which claim, if valid, is a set-off against the sum due upon the mortgage, but which is not established nor the amount thereof adjusted, entitle the mortgagor to an injunction and receiver, in respect to the property pledged.

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APPEAL from an order made at a special term, for an injunction and a receiver.

Albert Mathews, for the appellant.

J. Larocque, for the respondents.

By the Court, DAVIES, P. J. The complaint alleges that the plaintiffs, being indebted to the defendant, made to him a pledge of a quantity of wine to secure that indebtedness; that portions thereof have been sold; that 285 quarter casks remain unsold in the custom house; and that the same is of the value of \$7550. The plaintiffs state that the balance due by them on such indebtedness is less than the amount of a promissory note, mentioned in the complaint, which was \$4997.33.

In considering this case, in the first place, it is well to disembarass it of all claim of the plaintiffs against the defendant on account of that note. How does it stand then?

The plaintiffs, admitting their indebtedness to the defendant in about the sum of \$5000, seek to restrain him by injunction from selling the property pledged to secure this indebtedness, and pray for the appointment of a receiver to take charge of the same. The injunction has been granted and an order made for such appointment. From this order the defendant has appealed. The ground of the injunction, as stated in the complaint, is that the plaintiffs apprehend the defendant, unless restrained by injunction, will part with the wines to a bona fide purchaser, so as to defeat the claim of the plaintiffs against him on said note. Now we regard it as well settled, that a receiver is never to be appointed over a mortgagee in possession, where he swears to a balance due him; much less when the plaintiff himself states such balance, and that the pledge is not an inadequate security for such balance. (*Quinn v. Brittain*, 3 Ed. Ch. Rep. 314. *Patten v. Acces. Transit Co.*, 4 Abbott, 235.)

In this view of the case, there being no allegation of danger

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or irresponsibility, on the part of the mortgagee in whose possession the property is, we see no reason for restraining him from selling the same, to reimburse himself for his advances; or why a receiver should be appointed to take the same out of his possession, and make sale thereof, and keep the proceeds until the accounts are finally settled between the parties.

Next, as to the right of the plaintiffs to have an injunction and receiver, on account of the moneys due them by the defendant on the note of theirs loaned to him, and which they have taken up, and now claim that it should be repaid by him. This is nothing more than a simple contract debt of the plaintiffs, against the defendant, and which, to the extent claimed by them, is denied by him. It has no connection with the pledge of wines, and forms no lien on them. It is simply a claim of the plaintiffs for the amount actually due to them upon it, against the defendant, and which, to that extent, reduces their indebtedness to him. It is a set-off in their hands to that amount, but while it is not established and the amount is not adjusted, this court ought not to restrain the defendant from selling the pledge, or sufficient to reimburse himself. A simple contract creditor cannot have an injunction to restrain even a fraudulent disposition of property; much less to retain it in the possession of the alleged debtor, or place it in the hands of a receiver. (*Reubens v. Joel*, 3 *Kern.* 488.) Without discussing the other questions presented in the papers, we think the order appealed from cannot be sustained, in either of the aspects in which it is claimed to be right by the plaintiffs; and it must therefore be reversed with costs.

[NEW YORK GENERAL TERM, November 4, 1858. *Davies, Clerke and Sutherland*, Justices.]

LYDIA MILLS, impleaded, &c. *vs.* WILLIAM T. MILLS and others.

A testator by his last will directed that on his youngest child coming of age one third part of his estate should be set apart and invested for the use of his wife during her life, and at her death it was to be divided among his children. The "residue" of his estate he also directed to be divided among his children. The provision in favor of the widow was not declared to be in lieu of her dower. *Held* that the widow was not bound to elect between her dower and the provision made for her by the will, but was entitled to both. CLERKE, J. dissented

THE husband of the plaintiff being possessed of a large real estate, in and by his last will directed that on his youngest child coming of age, one third part of his estate should be set apart and invested for the use of his wife during her life, and at her death it was to be divided among his children. The "residue" of his estate he directed to be divided among his children. The provisions of the will were not declared to be in lieu and bar of the widow's dower. On partition the referee reported that the widow was entitled to dower in the whole estate of her husband, in addition to this provision for her during life. This decision of the referee was overruled at special term, and a judgment entered, declaring that the widow was not entitled to dower in the estate, but that this provision was to be deemed and taken to be in lieu and bar of dower.

From this judgment an appeal was taken by the widow.

M. S. Bidwell, and *G. R. Hart*, for the appellant.

Geo. Thompson, for the respondent.

DAVIES, P. J. Dower is a species of life estate, created by the act of the law, and it exists where a man is seised of an estate of inheritance and dies in the lifetime of his wife. (4 *Kent's Com.* 35.) It cannot be extinguished by the husband alone; nor can he defeat it by any act in the nature of alienation or charge, without the assent of the wife given and

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procured according to law. (*Id.* p. 53.) The same learned commentator says that the testamentary disposition in lieu of dower, in order to render it such, even with the widow's acceptance of it, must be declared in express terms, to be given in lieu of dower, or that intention must be deduced by clear and manifest implication from the will, founded on the fact that the claim of dower would be inconsistent with the will, or so repugnant to its dispositions as to distract and defeat them. (4 *Kent's Com.* 62.)

The court of appeals in *Sheldon v. Bliss*, (4 *Seld.* 31,) by Gardiner, J., enunciate the rule that "it is an established principle that a provision in the will of a husband, in favor of the wife, will never be construed by implication to be in lieu of dower or any other interest in his estate given by law; the design to substitute the one for the other must be unequivocally expressed."

In the case of *Leonard v. Steele*, (4 *Barb.* 20,) a son inherited from his father, who died intestate, certain premises, subject to the dower therein of his mother. He devised a part of the real estate which descended to him from his father to his mother, and the residue to the defendant Steele. Paige J., says: "The doctrine of election originates in incidental or alternative donations, where there is a clear intention of the person from whom one or both are derived, that one should be a substitute for the other."

And the question in that case was whether the widow should be put to her election. The learned justice says, "The testator owned the entire estate in these premises, subject to his mother's dower therein. He has not declared his intention, in his will, to dispose of the whole estate in these premises, including the dower of his mother, or that she should relinquish either such dower or the devise under the will, nor is such intention deducible by clear and manifest implication from the provisions of the will. The presumption, therefore, is that the testator intended only to devise to the defendant his own estate in the premises, subject to the dower of his

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mother. The devise to the defendant is not necessarily inconsistent with Mrs. Leonard's (the mother's) right to dower; as this devise is to be understood as being subject to all legal claims upon the premises, including dower. The right to dower being in itself a clear legal right, an intent to exclude it, or that it should be relinquished, must be demonstrated by express words or by manifest implication. In order to exclude it the instrument itself should contain a provision inconsistent with the assertion of such legal right." He cited *Story's Eq. § 1088, note 3, and Birmingham v. Kirwan, (2 Scho. & Lef. 452.)*

So in the present case, the testator was seised of the premises in question, subject to the inchoate right of dower of his wife. It was a clear legal right in the whole estate, and an intention to exclude her from any part of it and put her to her election, must be demonstrated by clear words or by manifest implication. There are no words manifesting such intent contained in the will, and the case just cited is an authority for the position that an absolute devise of a portion to the doweress, and a devise of the residue to another, is not sufficient to manifest or raise the implication of an intent to exclude her. (*See also Sanford v. Jackson, 10 Paige, 266.*)

But the case of *Havens v. Havens, (1 Sandf. Ch. Rep. 324,)* is more like the present case than any I have found. There the testator devised to his wife, for life, the house and lot in which he resided, and gave also to her large specific legacies, which together amounted to nearly or quite half of his estate, and gave the residue of his estate to his widow and brothers and sisters, to be apportioned between them in accordance with the directions of his will. And the assistant vice chancellor (Sandford) held that these gifts were not inconsistent with the widow's claim of dower in the residue of his real estate which was devised to her, and to his brothers and sisters, or in that of which he died intestate, and that she should not be put to her election between her dower and the provisions made for her by the will. He says, "suppose the testa-

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tor died seised of a single house and lot after devising it to be divided between his widow and his brothers and sisters. The widow would, undeniably, take her dower and an equal interest, with each of the other devisees, in the residue. So if the devise had been of one third to her for life, and the residue to the brothers and sisters, she would take her dower and the other third under the will. The testator's interest in the residue *in this case*, and in the house and lot in the case put, which he could give by his will, *is the property subject to the dower right*. Out of this property which he has, less the inchoate right of his wife to her dower, he can carve such interest as he pleases, and his wife is as competent to take one or more of such interests as devisee as any other person." These positions are fully sustained by the authorities cited by the learned vice chancellor. It would seem, therefore, on authority, to be clear that in the present case the appellant was as competent to take as any other devisee, and such devise and taking in no wise affected or impaired her rights of dower in the whole estate, or compelled her to elect which she would take, dower or the devise. She is entitled to both.

The case of *Chalmers v. Storil*, (2 Ves. & Beame, 222,) has been cited and relied upon as authority for the contrary doctrine. In that case the testator gave to his widow and his daughter and son all his estates, to be divided *equally* among them. Sir William Grant, the master of the rolls, held that as to the widow's right to dower, whether she took, under the will, an absolute interest or for life only, it was a case of election, the claim of dower being directly inconsistent with the disposition of the will. "The testator directing all his real and personal estate to be equally divided, &c., the same equality is intended to take place in the division of the real as of the personal estate, which cannot be, if the widow first takes out of it her dower and then a third of the remaining two thirds." It was held to be a case of election, for the reason that the will directed the estate to be equally divided, and this direction of the will would fail altogether, if the widow

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took her dower and the devise. The claim of dower in this case was inconsistent with the will, and so repugnant to its dispositions that to allow it would disturb and defeat them.

The principles applicable to a case like that now under consideration, are well and clearly stated by Kindersly, V. C., in *Gibson v. Gibson*, (17 *Eng. Law and Eq. Rep.* 349.) That case appears to have been elaborately argued and carefully considered, and all the authorities bearing upon the questions raised, cited and discussed. The testator gave to his wife certain specific chattels and a leasehold estate. He then gave all the residue of his estate to trustees to sell and dispose of the same, and gave out of his personal estate the sum of £4000 in trust for his wife during life, and as to the residue of his estate he gave one fourth part thereof absolutely to his wife, and the three other fourth parts thereof to the relatives. Held that the widow of the testator was not to be put to her election, but was entitled to dower as well as the benefits given her by the will. The vice chancellor, in delivering his opinion, says: "It is difficult, perhaps impossible, to reconcile all the authorities on this subject, but we cannot examine them without finding certain broad and clear principles forming the foundation of every decision on the subject." He says the principles may be stated in the following manner. The first is that the doctrine of election is founded on the same reasons and governed by the same rules, when applied to a widow claiming dower, as when applied to any other case. The second proposition, applicable to all cases, is that a person who is entitled to any benefit under a will or other instrument, must, if he claims that benefit, abandon every right or interest, the assertion of which would defeat, even partially, any of the provisions of that instrument. And applying this to the case of dower, the doctrine is, that if the testator has made such a disposition of his real estate as that the assertion by the widow of her right to dower would prevent that disposition taking effect as the testator intended, then she must elect to abandon either her dower or the benefit given her by the will.

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The third proposition is that in no case is a person to be put to an election, unless it is clear that the provision of the instrument under which he is entitled to any benefit, would be in some degree defeated by the assertion of his other right. And therefore in the particular case of dower, unless it is beyond reasonable doubt that the assertion by the widow of her right of dower would prevent the giving of full effect to the testator's intention, the widow shall not be put to her election. It is not enough to say that upon the whole will it may fairly be inferred that the testator intended his widow should not have her dower. In order to compel her to elect, the court must be satisfied that there is a *positive* intention, either expressed or *clearly* implied, that she is to be excluded from dower. The fourth proposition is, that the intention to exclude the widow from dower must be apparent on the face of the will itself. The vice chancellor reviews all the cases bearing on the points, and clearly shows that they fully sustain them.

In alluding to the case of *Chalmers v. Storil* he says, the decision in that case has been the subject of very just criticism, and he avows that the reasons assigned by Sir William Grant for it, are to his mind far from satisfactory. He then proceeds to show wherein that case differs from the one under consideration by him, and adds, that "whatever may be the respect due to the decision in *Chalmers v. Storil*, its authority must be confined to cases where the testator intends to give to his wife and the other objects of his bounty all that he himself possessed and enjoyed, in *equal* shares and proportions."

In the present case there is nothing in the will indicating the intention of the testator that his residuary and other devisees are to be put upon an equality. I cannot doubt, therefore, upon principle and authority, that the widow of the testator in this case takes the provision made for her by the will, and the dower given to her by law; and that it is a case where she is not to be put to her election.

The judgment of the special term should therefore be re-

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versed and a new trial ordered, costs of all the parties to be paid out of the funds of the estate.

INGRAHAM, J., concurred.

CLERKE, J., (dissenting.) The language of Judge Gardiner in *Sheldon v. Bliss*, (4 *Selden*, 35,) evidently transcends the limits of the rule on this subject; and, as the point did not expressly or necessarily arise in that case, under the consideration of the court, his proposition, in the unqualified terms in which he expresses it, should not be considered authoritative. His language is, that "the design to substitute one for the other [the provision in a will, for dower] must be unequivocally expressed," omitting an equally important part of the rule, "or manifestly implied." The question, in the present instance is, Is this design manifestly implied in this will? I venture to say that the more critically its several provisions are examined, it will be found that this claim of dower is clearly at variance with the testator's intention. The design of substitution is manifestly implied. Why should not the intention be the pole-star (as Coke calls it) to guide us in the interpretation of the will, in relation to a point involving a claim to dower, as well as in relation to a question involving any other claim? I see nothing in the suggestions of reason, or in the rules of construction, requiring any exceptional regard in favor of the former. All the casual observations in judicial opinions, importing any thing of this kind, have no foundation in policy or law. They are entirely gratuitous, and are the merest *dicta*. I admit, indeed, that it is a good test, "whether the devises (or provisions) of the will are so utterly repugnant to the claim for dower, that they cannot stand together." (*Lewis v. Smith*, 5 *Selden*, 512.) The appellant's claim to dower, in addition to the gift under the will, is repugnant to its whole scheme and scope; defeating the provision in favor of the other members of the testator's family. The will gives to them two thirds; this claim would give them only one

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third. The provisions of the one are, therefore, utterly inconsistent with the allowance of the other.

As to the circumstance mentioned by Judge Ingraham, that the will gives the appellant nothing in the residue, until after the youngest child arrives at age. Even if this were so, I do not think it would be of sufficient force to show that the testator intended to give his wife two-thirds of his property, and his children, of whom he had a considerable number, only one third. But, I think, the idea is a misapprehension, arising from the defective method in which the will is framed. The portion of it referred to, directs absolutely, that one-third of the whole estate be reserved, &c. for the use and benefit of the testator's wife; all that it can be fairly said to prohibit, or to postpone, is a *final distribution* among the children, until the coming of age of the youngest child. To be sure, the provision for his wife immediately follows the direction, in general terms, relative to a final distribution. Then it says, "First, I will and direct one-third of my said estate be reserved &c. for her sole use and benefit *during her life*, and at her death be divided," &c. He could not have meant *during that portion of her life* after the youngest child came of age, even if he meant to give all that the appellant claims; and the referee reports, in effect, that not only the dower, but the additional one-third commences forthwith. Otherwise, the accruing of her interest would be too remote; and its enjoyment uncertain, and even improbable. He must have meant by the words "during her life," the whole of her life, commencing as soon as practicable after the testator's death. To the executors is committed, in the second paragraph of the will, the care of his whole estate; and it is their duty to invest the whole proceeds of this estate immediately, if the whole be sold; at all events to set apart enough to realize one-third for the benefit of the widow, and to hold the remainder in reserve for the benefit of the other beneficiaries; the final distribution of the two-thirds of the estate to be made when the youngest

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child comes of age. This is the clear intention of the testator ; which, as I have said, is to be our only guide.

The judgment of the special term should be affirmed, with costs.

I perceive the presiding justice provides in his opinion that the costs of *all the parties*, with a reasonable counsel fee, should be paid out of the funds of the estate. The widow, I believe, is the only party who has appealed ; and William T. Mills is the only party who has appeared *against* the appeal.

Judgment reversed.

[NEW YORK GENERAL TERM, November 4, 1858. *Davies, Clerke and Ingraham*, Justices.]

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ROBERTS vs. CARTER.

The report of a referee should state the facts found, and the conclusions of law, separately.

Where the evidence, on a hearing before the referee, is conflicting, it presents a fair question for the decision of a referee ; and it is a most salutary rule that the decision of a referee, upon a question of fact—especially of fraud—where there is evidence on both sides, and the point is not entirely free from doubt, cannot be disturbed.

Where it appears, when depositions are offered in evidence, that every reasonable effort has been made, to find the witnesses, to subject them to the process of subpoena ; and there is every reason to suppose that they are out of the state, this is sufficient to authorize the reading of the depositions.

Where goods are sold by sample, and are represented to be of a specified quality, the rule of damages in an action for a breach of warranty, or for false representations, is the difference between the price obtained, on a resale, and that which would have been obtained had the goods been of the quality represented.

A PPEAL from a judgment entered upon the report of a referee. The action was brought to recover of the defendant the loss and damages sustained by the plaintiff on account of certain false and fraudulent representations alleged to have

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been made by the defendant, on a sale of liquors to the plaintiff; and upon a warranty on said sale; and for the defendant's neglect to furnish the plaintiff with a receipt or information, by means of which a certain kind of liquor or schnapps could be made, at a specified cost, equal in quality to Wolfe's schnapps, &c. The cause was referred to a referee, who reported, that he found that the defendant, on or about the 7th day of June, 1855, sold to the plaintiff 84 cases of an article known as royal Scheidam schnapps, alleged to be out on commission, and 139½ cases of the said royal Scheidam schnapps in store, at No. 5 William street, in the city of New York, all of which were sold by sample, and represented and agreed by the defendant to be of equal quality and proof with the sample, and equal in quality and proof to the article known as Wolfe's Scheidam aromatic schnapps, for which the plaintiff, relying upon the said representations and agreements of the defendant, paid the defendant the full value and price, as agreed, for schnapps of the quality and proof as represented by the defendant as aforesaid; and that, in truth and in fact, the said schnapps, both those out on commission and those on hand in the said store, were inferior in quality and proof to the said samples and the said Wolfe's aromatic Schiedam schnapps. That the defendant, for \$388.13, paid by the plaintiff to him, promised and agreed that, immediately after such payment, he would furnish the plaintiff with a recipe or information, by means of which the plaintiff might manufacture a certain article known as royal Scheidam schnapps, equal in quality and proof to the article known as Wolfe's Schiedam aromatic schnapps; and that the said royal Schiedam schnapps made agreeably to the said recipe or information, were and would be equal in quality and proof to said Wolfe's schnapps. That the defendant has never given or furnished the plaintiff with such a recipe or information, but, instead thereof, named certain articles or materials and their relative proportions or quantities, and the mode of using them, which the defendant represented and alleged would make and constitute the royal

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Schiedam schnapps of the quality and proof before stated, when, in truth and in fact, the said materials named by the defendant do not produce, and cannot, in the proportions directed by the defendant, be made to produce the quality and proof of schnapps represented by the defendant. That the plaintiff has sustained damages, by means of the premises, to the amount of the difference between the price at which the schnapps, whether in store or out on commission or manufactured in accordance with the recipe or information given by the defendant, and actually sold by the plaintiff, would have sold for, in case they had proved equal in quality and proof to the samples aforesaid and to Wolfe's schnapps, as represented and agreed by the defendant, and the price at which they were, in fact and in good faith, sold by the plaintiff. That the plaintiff actually sold 205 cases of schnapps, either in store or out on commission at the time of the said sale, or made in accordance with the recipe given by the defendant to the plaintiff, all of which were inferior in quality and proof to Wolfe's schnapps and to the said sample; and that the difference between the price at which the said 205 cases might and would have been sold for, in case the quality and proof had proved equal so the said sample and to Wolfe's aromatic Scheidam schnapps, and the price for which they were actually sold, was \$4 per case, making in all the sum of \$820, for which sum the plaintiff was entitled to judgment against the defendant.

Three witnesses, William H. King, jun. Charles Potter and Frederick Smith, were examined conditionally, on the part of the plaintiff, pursuant to a stipulation. Their depositions being offered in evidence, before the referee, the defendant objected that there was not sufficient proof of the absence of those witnesses from the state. The plaintiff then introduced proof tending to show that King was a resident of Ohio, and had left the city for that state the week previous; that Smith was a resident of California, and had sailed for home in the next steamer after his testimony was taken; that Potter, also,

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was out of the state, and had gone to California. Also that the plaintiffs had attempted to serve subpoenas upon those witnesses. The referee refused to admit the depositions in evidence.

The defendant excepted to the report of the referee, on various grounds, and appealed from the judgment entered thereon.

E. Terry, for the appellant.

John Fitch, for the plaintiff.

By the Court, DAVIES, P. J. We think this case is not before us in proper form. The report of the referee should have stated the facts found, and the conclusions of law, separately. (*Otis v. Spencer*, 16 *New York Rep.* 610. *Hunt v. Bloomer*, 3 *Kern.* 341. *Johnson v. Whitlock*, *Id.* 344.)

Assuming that the referee had stated the facts correctly, we see what facts he has found, and with that finding we cannot interfere; unless it is clearly against the weight of evidence, or is in direct violation of some rule of law. (*Davis v. Allen*, 3 *Comst.* 168. *Murfey v. Brace*, 23 *Barb.* 561.) The latter case enunciates a sound rule, and one directly applicable to the present case. It is that when the evidence, as in this case, is conflicting, it presents a fair question for the decision of the referee; and it is well observed that it is a most salutary rule that the decision of the referee, upon a question of fact, especially of fraud, where there is evidence on both sides, and the point is not entirely free from doubt, cannot be disturbed.

The objection to the depositions of Potter and Smith, we think are not tenable; as the proof was quite satisfactory to show that when their depositions were admitted, there was every reason to suppose the witnesses were out of the state. Every reasonable effort had been made to find them, to subject them to the process of subpoena, and the proof was quite adequate to authorize the reading of their depositions.

The defendant sold to the plaintiff 84 cases of schnapps out

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on commission, and 139 in store, which the referee has found as a fact were sold by sample, and represented to be of a quality equal to Wolfe's schnapps. That the plaintiff sold 205 of these cases, or some others made in accordance with the recipe, how many does not clearly appear; and that the difference between the price obtained, and that which would have been obtained if the article had been of the quality represented, was \$4 a case; and the referee allows to the plaintiff only on the 205 cases. We are unable to see why the referee did not allow for the 223 cases which were sold, and this would have increased the amount of the damages. We do not see that the defendant can complain of this.

Assuming that the referee has found the facts correctly, we see no error in the rule of damages adopted by him. As he has allowed no damages to the plaintiff by reason of the recipe not proving what it was represented to be, it is unnecessary to consider what was the effect and character of the representations of the defendant (if any) in respect to it.

The judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, November 4, 1858. *Davies, Clerke and Sutherland*, Justices.]

 BEAN vs. WELLS and RENWAY.

W. obtained goods from the plaintiff, on credit, upon the representations of R. that he, W., was responsible, and worthy of credit, and owed very little, if any thing. At the time of the sale and delivery of the goods, W. was insolvent and R. knew it. R. himself had a judgment for \$1000 against him, docketed one month previous to the sale. On this judgment R. caused an execution to be issued, and levied upon the goods so obtained from the plaintiff, before they reached the store of W. *Held* that for these false and fraudulent representations R. was liable to the plaintiff for the value of the goods sold to W.

APPEAL from a judgment entered upon the report of a referee. The action was brought to recover the value of goods

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sold by the plaintiff to the defendant Wells, upon fraudulent representations alleged to have been made in regard to his credit and responsibility, by the defendant Renway. The referee found the following facts. That in the early part of August, 1851, the plaintiff, at the city of New York, sold and delivered to the defendant Edward Wells, merchandise to the amount of \$258.56, on a credit of six months, for which he took said Wells' promissory note. That the order for them was received and the bill thereof dated the 30th day of July, 1851, but the goods were not delivered till some time in August, 1851. That the delay in the delivery of the goods grew out of the plaintiff's doubt and hesitancy about the responsibility of said Wells. That he was finally induced to sell and deliver the goods to Wells by the representations of the defendant Renway, that he (Wells) was good and responsible to the extent of \$800, to \$1000. That he was a prudent and careful man, worth \$2000 to \$3000, and owed very little if any thing, and that he was every way responsible and worthy of credit. That at the time of such sale and delivery, Wells was considerably in debt, and was in fact insolvent, and that the defendant Renway knew it; and that among other debts owing by Wells, at the time of this sale, was a judgment docketed against him on the 30th day of June, 1851, one month before the sale, in favor of the defendant Renway, for \$1000 and costs, and on which judgment Renway caused an execution to be issued and levied upon the same goods so sold and delivered by the plaintiff to Wells, on their arrival at Whitehall, and before they reached the store of said Wells. That such representations on the part of the defendant Renway were false and fraudulent, and were designed to induce, and did induce, the sale and delivery aforesaid. And the referee found and decided as matter of law, that the plaintiff was entitled to judgment against both defendants for said sum of \$258.56, and interest thereon, besides costs; for which amount judgment was entered.

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A. T. Bush, for the appellant.

John Fitch, for the plaintiff.

By the Court, SUTHERLAND, J. The defendant Wells in this action was not served with the summons. There is a good cause of action stated in the complaint, against the defendant Renway, to which he appeared and answered, and the issue was referred to A. K. Hadley, Esq. who reported in favor of the plaintiff. The report of the referee, and the judgment entered thereon, were abundantly justified by the law and the evidence.

The evidence in the case, to which no objection was made, appears to us to have been amply sufficient to authorize the conclusion to which the referee arrived; and we are at a loss to see upon what ground the defendant Renway expected us to set aside the report of the referee and reverse the judgment.

The judgment entered on the report of the referee must be affirmed, with costs.

[NEW YORK GENERAL TERM, November 4, 1858. *Davies, Clerke and Sutherland*, Justices.]

PALMER, assignee of Antioch College, *vs.* SMEDLEY.

A complaint, after alleging the existence of Antioch College, and its incorporation, averred that on the 29th of June, 1857, the said college made an assignment of its estate, &c. to the plaintiff, by which he was empowered to sue for and collect all the debts of the college and apply the proceeds in payment of the creditors of the corporation. That on the 5th of April, 1851, the defendant made his promissory note for the sum of \$100, payable &c., and delivered the same to the said Antioch College; that the note had never been paid; that it was now in the possession of the plaintiff, as the property of the college, which was the lawful owner and holder thereof, &c.; *Held*, on demurrer, that the complaint was defective, in its method of stating the ownership of the note.

The same complaint also alleged, that on, &c. the defendant became a subscriber to the stock of Antioch College, to the amount of \$100, payable &c.;

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that the same had never been paid, and that there remained due and owing to the said college the amount of said subscription, with interest. *Held* that in respect to this cause of action the complaint was also bad, for want of an averment of indebtedness to the plaintiff, or of any right shown, on his part, to demand of the defendant the money therein mentioned.

APPEAL from an order made at a special term, allowing a demurrer to the complaint. The plaintiff sued as "Assignee of Antioch College." The complaint was as follows:

"*Firstly.* That at the times hereinafter mentioned, Antioch College was a joint stock association, existing and located at Yellow Springs, in the county of Green, in the state of Ohio; that on the 24th day of May, 1852, the said association was duly incorporated, under and according to the provisions of an act of the general assembly of the state of Ohio, passed on the 9th day of April, 1852, entitled 'An act to enable the trustees of colleges, academies, universities and other institutions, for the purpose of promoting education, to become bodies corporate.' That by the terms of incorporation of the said Antioch College, the trustees thereof became, by the laws of Ohio, a body politic and corporate, with perpetual succession, having power to sue and be sued, to plead and be impleaded, to acquire, hold and convey property, real and personal, and to exercise the powers and privileges usually bestowed on incorporated institutions of learning. That the said Antioch College continued to use and enjoy the said powers and privileges, and to acquire and hold property as aforesaid, until the 29th day of June, 1857, when being heavily in debt, and unable to meet its obligations and liabilities, the trustees thereof made a general assignment, for the benefit of its creditors, of all its estate and effects, goods, chattels and credits, of whatever nature or kind soever, to Francis A. Palmer, the plaintiff in this action, by which assignment the plaintiff was empowered, among other things, to sue for and collect all the outstanding debts of the said college, and to apply the proceeds thereof, as far as the same should go, to paying the creditors of the said corporation.

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The complaint shows, *Secondly*. On information and belief of the plaintiff, and as a first cause of action against the defendant, that on the 6th day of January, 1851, the defendant in this action made and executed his promissory note in writing, whereby he promised to pay, for value received, to the treasurer of Antioch College, or bearer, on the 1st day of September, 1852, one hundred dollars, and delivered the same to the said Antioch College. That although the said note became due and payable before the commencement of this action, the same has never been paid; that the said note is now in the possession of the plaintiff as property of the said Antioch College, which is the lawful owner and holder thereof; and there is now due on the said note, principal and interest, the sum of \$153.58.

The complaint shows, *Thirdly*. On information and belief of the plaintiff, and for a further and a second cause of action against the said defendant, that the said Antioch College was a joint stock association, duly incorporated as aforesaid, under the laws of Ohio; that the stock of the said association was issued in shares of \$100 each; and that on the 6th day of January, 1851, the defendant in this action became a stockholder in the said association, by subscribing to and purchasing of the said association one share of the capital stock thereof. That the said subscription became due and payable on the 1st day of September, 1852, yet the same has never been paid, although the said stock was duly issued to the said defendant, and he has since enjoyed all the rights and privileges of a stockholder in the said association. That the said defendant is still the owner of the said stock, and there remains now due and owing to the said Antioch College thereon, principal and interest, the sum of \$135.58; and that by the laws of Ohio, where the said association is located, the defendant is liable to the said association, as a stockholder therein, to a further amount, equal to the amount of the said stock, to be applied in the payment of the debts of the said association. Wherefore, by reason of all the premises above set forth, the plaintiff

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demands judgment against the said defendant for \$271.16, with interest thereon from the first day of October, 1857, besides the costs and disbursements of this action."

The defendant demurred to this complaint, assigning several grounds of objection thereto. The demurrer was argued at special term, before Justice DAVIES, who made an order allowing the demurrer; assigning the following reasons for his decision :

DAVIES, J. "The complaint contains two causes of action. After alleging the existence of an association called Antioch College, and its incorporation by the state of Ohio, it avers, that on the 29th June, 1857, the said college, being heavily in debt, made an assignment of its estate, &c. to the plaintiff, and by which he was empowered to sue for and collect all the outstanding debts of said college, and apply the proceeds to the payment of the creditors of the corporation. It then avers that on the 5th of April, 1851, the defendant made his promissory note for the sum of \$100, payable September 1st, 1852, and delivered the same to the said Antioch College; that the note had never been paid; that it was now in possession of the plaintiff as the property of said Antioch College, which is the lawful owner and holder thereof; that there is due on said note \$138.58. For a second cause of action, the complaint avers that the stock of said association was issued in shares of \$100 each; that on the 5th of April, 1851, the defendant became a subscriber to the stock of the college in the sum of \$100, payable on the first day of September, 1852; that the same has never been paid, and that there now remains due and owing to said college the amount of said subscription and interest, amounting to \$135.58, whereupon the plaintiff demands judgment for \$271. To this the defendant demurs, on the ground that the complaint does not state facts sufficient in law to constitute a cause of action.

As to the first cause of action, it is clearly defective. It not only does not aver that the plaintiff is the party in interest,

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but avers that the note sued on is not the property of the plaintiff, and that he is not the lawful owner and holder of the same, but that it is the property of another, and which other is the lawful owner and holder thereof. This is in direct conflict with section 111 of the code. The presumption of law which would arise from the fact that the plaintiff being in possession of the note is the lawful owner and holder thereof, is rebutted by the averments that he is not such lawful owner and holder.

In reference to the second cause of action, there is no averment of any indebtedness to the plaintiff by reason of the matters therein stated, or of any right shown on his part to demand of the defendant the money therein stated. The averment is, that the amount of the subscription is now due and owing to said college, thus negating any indebtedness to the plaintiff. Judgment must be given for the defendant on the demurrer, with costs. Liberty to plaintiff to amend in twenty days."

Wm. W. Badger, for the appellant.

Gardner & Lamont, for the respondents.

DAVIES, P. J. delivered the opinion of the court, to the effect, that the complaint was defective in the particulars specified; stating that he could add nothing to the reasons given by him at the special term.

Judgment affirmed, with costs.

[NEW YORK GENERAL TERM, November 4, 1858. *Davies, Clerke and Sutherland*, Justices.]

EAGLE, executor, &c. *vs.* Fox.

The plaintiff, as executor, sued W. for a claim due to the testator. When the plaintiff was about to take judgment, the defendant gave his two notes to the plaintiff as executor, in settlement, and the plaintiff, as such executor, assigned a decree which he had obtained, in the surrogate's court, against W., to the defendant. One of the notes was paid at maturity; when the second became due it was not paid, and the defendant gave to the plaintiff a new note, in renewal. *Held* that the plaintiff could maintain an action upon such new note, in his character as executor, the complaint showing the consideration for the note to be a claim due to the estate, and a promise made to the executor.

APPEAL by the defendant, from a judgment entered at a special term, after a trial at the circuit. The action was brought by the plaintiff as executor of William Wright, deceased, upon a promissory note made by the defendant, on the 26th of November, 1856, by which he promised to pay to his own order \$300 ninety days after date; which note was also indorsed by him, and delivered to the plaintiff. On the trial the plaintiff called as a witness Jesse W. Benedict, who testified as follows: "Before letters testamentary were issued to the plaintiff, letters of collection were issued to Charles White, and defendant was his surety; plaintiff called White to account before the surrogate of the county of New York, and a decree was obtained against White as collector, in favor of plaintiff as such executor, for assets of the estate of William Wright, deceased, which he had collected and failed to pay over to the plaintiff as such executor; execution was issued on that decree in favor of the plaintiff as such executor, and it was returned unsatisfied, and then the surrogate ordered the bond of defendant as surety to be prosecuted by the plaintiff as such executor; that the plaintiff Eagle, as executor, sued defendant on his said bond, and when ready to take judgment, the defendant gave his two notes to plaintiff as such executor, in settlement; and the plaintiff, as such executor, assigned the decree obtained in the surrogate's court to the defendant; when the first note became due it was paid; when the second

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note became due it was not paid ; and the defendant gave the note in suit in renewal ; I held the notes for collection for Eagle ; I acted as attorney for Eagle, in getting the note, and I know the plaintiff received the notes in suit as executor, and that he holds them as executor, and that the notes belong to him as executor, and in no other way ; I transacted the whole business for plaintiff as executor, received all the notes from the defendant, and have retained them ever since in my possession, for the plaintiff, as executor." The plaintiff rested his case, and the defendant moved to dismiss the complaint, which was denied ; whereupon the defendant excepted. The defendant then requested the justice to charge the jury : 1. That the plaintiff as executor not being the owner of the note in suit, the defendant was entitled to a verdict. The justice refused so to charge, to which refusal to charge the defendant excepted. 2. That if the jury should find the note in suit was given for a consideration arising since the death of the testator, the note was the property of the plaintiff personally, and not of the plaintiff as executor of William Wright, deceased, and the defendant was entitled to a verdict. The justice refused so to charge, and the defendant excepted. The court then directed the jury to find a verdict for the plaintiff for \$310.50, and they found accordingly.

A. Mathews, for the appellant.

Benedict & Boardman, for the plaintiff.

By the Court, INGRAHAM, J. The plaintiff as executor sued one White for a claim due to the testator. When that action was proceeding to judgment the defendant gave this note in suit and another, to the plaintiff as executor, and took from the plaintiff an assignment of a decree made by the surrogate, in favor of the plaintiff as executor against White. The note not having been paid, the plaintiff as executor brings this

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action to recover the same. The defense is that the action should have been in the name of the plaintiff, individually.

There is no doubt but that the note was given in payment of a claim due to the testator's estate by the defendant; and the simple question is, whether an executor who sells goods or choses in action, belonging to the estate which he represents, may collect payment therefor in his capacity of executor. Of this I think there can be no doubt. The property belongs to the estate; for the proceeds of the note the executor will be required to account, and personally he has no interest in the proceeds. He might have maintained the action in his own name, it is true, but he was not necessarily compelled to do so. On the contrary, under the present system, which requires a plain statement of facts in the complaint, I think the law is better obeyed by bringing the action according to the truth, than in doing so under a legal fiction.

In *Merritt v. Seaman*, (2 *Seld.* 168,) the promises were assumed to have been made to the plaintiff individually, and it was there held that in such a case the defendant could not set off a claim against the estate. Judge Gridley, in that case, says: "The plaintiff might have sued in his representative character, or individually, as he chose." And Justice Gardiner, in the same case, says: "The note was made after the death of the plaintiff's testator, and would sustain an action either in the name of the plaintiff as an individual or as executor."

In the complaint the facts are so set out as to show the consideration for the note to be a claim due to the estate, and the promise to have been made to the executor. The case of *Blanchard, adm'r, v. Strait*, (8 *How. Rep.* 83,) only shows that where a plaintiff in his summons describes himself as suing in a representative capacity, he cannot complain for a cause of action due to him individually. And in *McMahon v. Allen*, (12 *How. Rep.* 46,) the reverse of the proposition was held, that a plaintiff who commenced his action as an

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individual could not afterwards change it into one for a claim held by him in a representative character. Both of these cases are rather in the plaintiff's favor than the defendant's

The judgment should be affirmed.

[NEW YORK GENERAL TERM, November 4, 1858. *Davies, Clerke and Ingraham, Justices.*]

MCBRIDE *vs.* THE FARMERS' BANK OF SALEM, Branch of
the State Bank of Ohio.

Proceedings supplementary to execution may be taken, under section 294 of the code, against a foreign corporation.

Where an action is commenced against a foreign corporation, by attachment, and the sheriff levies on money on deposit in a trust company, and the defendant, instead of procuring the attachment to be discharged by giving security or applying for an order directing the sheriff to collect the debts attached by him, appears and makes a defense which is unavailing; and in consequence of the delay thus produced, the debt is lost, by the failure of the trust company, the defendant must bear the loss, rather than the plaintiff.

A levy upon property, under an attachment, does not amount to a satisfaction of the debt.

APPEAL from an order made at a special term denying a motion to vacate an order.

E. Terry, for the plaintiff.

Stanley & Langdell, for the defendant.

By the Court, INGRAHAM, J. This action was commenced by attachment against the defendant, a foreign corporation. After judgment an execution was issued and proceedings were taken under section 294 of the code, to reach moneys on deposit in the Ocean Bank, to the credit of the defendants. A motion was made to vacate the order restraining the Ocean

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Bank from paying over the moneys, and to declare the judgment satisfied, and to order a perpetual stay of proceedings on the execution. This motion was denied at a special term, and the defendants appealed to the general term. The grounds of appeal are: 1st. That proceedings supplementary to execution cannot be taken under the 294th section against a corporation. 2d. That the attachment by which the action was commenced was levied upon moneys on deposit in the Ohio Life and Trust Company, and in consequence of the attachment the money remained in deposit with that company until the company failed. That it was the duty of the sheriff to have collected the money, and as the loss has occurred through his negligence the debt is to be considered as paid, and the plaintiff's remedy is against the sheriff. Upon the first point we are all agreed in the opinion that there is nothing in this section that prevents its application to corporations. That by this section provision is made for notice to be given to the defendants, if the judge thinks such notice necessary, and the proceeding can as well be taken against the debtor of a corporation as against the debtor of an individual. That there is no necessary connection between section 292 and section 294 so as to make one depend on the other; as section 292 applies to cases where the execution has been returned, and section 294 where the execution is in the hands of the sheriff, and under the former proceeding the statute requires it to be limited to the county where the debtor resides, and the other requires no proof of residence, but merely of the issuing of an execution and the indebtedness of the person to the defendant.

The only embarrassment as to this question, with us, arises from a decision of the general term in the 8th district, that this section is not applicable to corporations. (*Sherwood v. Buffalo and New York City Rail Road Co.*, 12 Howard, 137.) In that case it was held that the proper mode of proceeding to enforce the payment of a judgment was, under the revised statutes, by sequestration. We feel unwilling to dis-

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regard the decision of any general term of this court, and where it is directly in point deem it desirable to follow it, and leave to the court above to correct any error, on appeal, rather than to present contradictory opinions from the general terms of different districts. But in this case there is a point of difference which we think takes this case out of that decision.

In the case referred to, the defendants were a corporation created under the laws of this state, and proceedings against such a corporation for sequestrating its effects may be taken under the revised statutes. (2 R. S. 463.) Such proceedings cannot be taken against the defendants, because they are not subject to our control, and the provisions of that statute are only confined to domestic corporations. The only mode of satisfying the execution issued on a judgment against foreign corporations, is by the proceedings on attachment and under the 294th section of the code. We see no objection to this proceeding under the 294th section. The same result would undoubtedly be attained if the sheriff had, on receipt of the execution, applied to the Ocean Bank for the purpose of levying on the property in their possession, under section 236. That section gives the sheriff the same power with an execution that he had with an attachment, and authorizes a levy by him on any rights, shares, debts or other property incapable of manual delivery, and requires a certificate to be delivered by the debtor of the defendants the same as on attachment, and it affords quite as effectual and easy a remedy as the proceedings under section 294. For the purpose of uniformity in the proceedings, it may be more desirable to adopt that course in proceedings against foreign corporations.

The second ground of appeal is, that by the attachment the debt which was attached has, in consequence of the delay, and of the omission of the sheriff to collect, been lost, and that the creditor must bear the loss, in analogy to the rule that imposes such loss on the plaintiff in case of a levy to satisfy an execution.

This doctrine, as applied to an execution, is to be taken as

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correct, only with some qualifications. In all the cases where the principle has been sanctioned, the property had been reduced to possession by the constable or sheriff and delivered to a receiptor, and without selling such property, or enforcing a remedy against the receiptor, a further levy was made. In such cases it was properly held that the execution was satisfied for the time by a levy on sufficient property to pay it, and that the levy *suspended* other remedies of the creditor while it continued, but it is added, "it never amounts to a satisfaction of the judgment." (*See all the cases reviewed in Denvrey v. Fox*, 22 Barb. 522.)

In a proceeding by attachment even that rule is not to be applied. The object of the attachment is not to obtain payment of the debt, but to bring the foreign corporation within the jurisdiction of the court. The defendants, at their pleasure, could discharge the attachment, by giving the security which the law permits; or they could have applied to the court, equally with the plaintiff, for an order directing the sheriff to collect the debts attached by him. Instead of doing so, they appeared and made a defense, which was unavailing, and in consequence of the delay produced by their own act, in defending what was decided to be a valid claim, the debt was lost. If either party is chargeable with having caused the loss of the debt, it was the defendants, for having made a fruitless defense, rather than the plaintiff for attempting to collect a just claim.

The order appealed from should be affirmed, with \$10 costs.

[NEW YORK GENERAL TERM, November 15, 1858 *Ingraham, Gould and Mullin*, Justices.]

KINGSLAND and others vs. BARTLETT and others.

An application to open a sale under a judgment, on the ground of misapprehension as to the time of sale, or any other circumstances not affecting the regularity of the proceedings, is addressed to the discretion of the court; and an order made thereon is not appealable.

A PPEAL from an order made at a special term, denying a motion to set aside a sale of mortgaged premises under a decree of foreclosure, and for a resale of the property. The motion was made by Timon, a judgment creditor of Bartlett, the mortgagor, whose judgment was recovered subsequent to the date of the mortgage. The grounds of the motion were, inadequacy of price, and the fact that Timon, who intended to bid upon the property, in order to protect himself, was misled by one of the plaintiff's attorneys, in regard to the probability of a sale taking place, and was thus prevented from attending the sale.

C. A. Runkle, for the appellant.

Sterling & Thayer, for the respondents.

E. J. Beach, for the purchaser.

By the Court, CLERKE, J. An application to open a sale under a judgment, on the ground of misapprehension as to the time of sale, or any other circumstances not affecting the regularity of the proceedings, must necessarily be addressed to the discretion of the court. And this discretion is regulated, as in every case where the court is called to exercise it, by the consideration whether, from the collateral facts, the conduct of the parties, and perhaps the amount for which the property was sold, it would be *expedient*, in justice to all concerned, including the purchaser, to order a resale. This excludes the idea of any right, on the subject. There can be no right where no legal mistake has been committed by those who have conducted the proceedings. There may be hard-

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ship, but this is entirely for the consideration of the judge who hears the application.

I think, therefore, the appeal should be dismissed, with \$10 costs.

[NEW YORK GENERAL TERM, November 4, 1858. *Davies, Clerke and Ingraham, Justices.*]

 JONES vs. UNDERWOOD and others.

In order to prove the execution of an attested instrument, the subscribing witness must be called, if he can be produced, and is capable of being examined.

The reasons for this rule, stated by CLERKE, J.

The testimony of the party executing the instrument cannot be received, as a substitute for that of the subscribing witness.

The change in the law, which allows parties to be witnesses, does not alter the rule, or afford any rule for dispensing with its observance.

APPEAL, by the defendants, from an order made at a special term denying a motion for a new trial. The action was brought upon an agreement made between the defendants and one John Cockle, by which the former agreed that, in case the latter would procure for the defendants the agency for the sale of certain rail road bonds, they would pay Cockle one third of their commissions upon the sale. It appeared in evidence that, through the efforts of Cockle, the defendants were appointed agents to sell the bonds, and sold the same; their commissions upon which sales amounted to \$7725. That the defendants afterwards paid to Cockle one third of the commissions received by them upon the first sales. That the defendants had been paid in full the amount of their commissions, but had not paid Cockle his share of the commissions upon the subsequent sales. The plaintiff

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sued upon the contract as assignee of John Cockle. Cockle was introduced as a witness on the part of the plaintiff. Being shown a paper, the witness said the signature of the party subscribed thereto was the signature of him, the witness. The counsel for the plaintiff then offered the same in evidence. The counsel for the defendants objected that the subscribing witness should be called, but the objection was overruled, and the defendants excepted, and the same was read in evidence. The paper was an assignment to the plaintiff, by Cockle, of his claim against the defendants under the contract before mentioned, relative to commissions on the sale of the rail road bonds, and of all demands. It was under seal, expressed a consideration of \$500, and was witnessed by E. C. Humbert. This is the only point in the case which it is necessary to mention. The jury found a verdict in favor of the plaintiff. Humbert was not produced as a witness, nor his absence accounted for.

William Bliss, for the appellants.

R. E. Mount, jr., for the respondent.

CLERKE, J. The assignment being a component and essential part of the plaintiff's right to maintain this action, if its execution was not legally proved, this verdict cannot be sustained.

The elementary principle is, that the execution of every attested instrument, whether under seal or not, must be proved by the subscribing witness, if he can be produced, and is capable of being examined. The reason is, that he may be able to state the time of the execution, and the circumstances attending it, which may be unknown to others; and the party, interested in defeating the instrument, is entitled to avail himself of all the knowledge of the subscribing witness, relative to the transaction. The rule is stated by Phillipps to be

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precisely the same, whether the acknowledgment is offered as evidence against the party himself, who made it, or against a third person, or whether it is the foundation of the action, or comes in collaterally, as part of the evidence in the case. Another reason of the rule is, that the witnesses, who subscribe at the time, are agreed upon by the parties to be the only witnesses to prove the execution. *McPherson v. Rathbone*, (11 *Wend.* 96,) is one of the most recent cases in which this rule is recognized ; although Savage, Ch. J., seems to restrict it to sealed instruments. His words are, "Where a *sealed* instrument is attested by a subscribing witness, the testimony of such witness is the best evidence of its execution ; the rule of the common law being relaxed in New York as to some instruments not under seal." The *dicta* of Spencer, J., in *Hall v. Phelps*, (2 *John.* 451,) seems to extend the exception to all instruments not under seal ; but the decision is generally considered as applying only to negotiable paper. (*Henry v. Bishop*, 2 *Wend.* 576.) There are several *dicta*, also, tending to allow instruments, not the foundation of the action, to be proved by inferior evidence ; but these have never become sufficiently authoritative, to modify the original rule, and have no greater force than the remarks of some judges relative to the admission of parol evidence to prove the *contents* of papers, which do not constitute the foundation of the action, but merely relate to some collateral fact. In neither instance, I believe, has the great principle of the common law, requiring the best evidence of which the case is capable, been in any degree modified.

But, at all events, the rule remains sufficiently effectual to dispose of this case.

The instrument, which was admitted in evidence, was essential to the action ; and it was a sealed instrument. It should have been proved by the subscribing witness. If, indeed, his absence had been sufficiently accounted for, as that he was dead, or could not be found after diligent inquiry, or that he

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was beyond the process of the court, proof of the handwriting of the subscribing witness could have been substituted. But nothing of this kind was attempted ; and the execution of the instrument was, therefore, erroneously proved.

It is unnecessary to consider the other questions presented on the argument, as the question I have been considering controls the case. The judgment should be reversed with costs, and a new trial ordered.

INGRAHAM, J. The necessity of calling a subscribing witness to prove the execution of a sealed instrument, has always been conceded, even by those judges who have considered the rule as improvident or unnecessary. In this state it has been relaxed as to promissory notes ; but it is still a matter of doubt whether the rule is not retained as to other papers not under seal, even in this state, unless they come in collaterally on the trial of the cause.

The case of *Hallenback v. Fleming*, (6 *Hill*, 303,) fully establishes the necessity and propriety of calling the subscribing witness, and a large number of cases are referred to in that decision to sustain the principle. The change in the law, which allows parties to be witnesses, does not, in my opinion, alter the rule, or afford any reason for dispensing with it. No man should be compelled to resort to his adversary for evidence, if he can have a witness who is disinterested. In this case the defendant was not present at the execution of the assignment : the only person there who was examined was the assignor ; and it is apparent that he was an adverse witness, having made the assignment, in order to have the action brought by another than himself. He had all the feelings of an adverse party.

I had occasion in the general term of the common pleas to examine this question in reference to the change of the law as to parties being witnesses, and we there held that the witness must still be called. (*Story v. Lovett*, 1 *E. D. Smith*, 153.)

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In the opinion written by Judge Woodruff, I fully concurred.

DAVIES, P. J., concurred.

Judgment reversed.

[NEW YORK GENERAL TERM, November 4, 1858. *Davies, Clerke and Ingraham*, Justices.]

HEMPSTEAD vs. NEW YORK CENTRAL RAIL ROAD COMPANY.

Where goods are delivered to a carrier, marked for a particular destination, without any directions as to their transportation and delivery, save such as may be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged.

The plaintiff and his assignors delivered to the Union Express Company, at Detroit, 319 kegs and 15 barrels of butter, to be transported to D., A. & R. Front street, New York. The packages were all marked "J. A. B., 17 Water street, New York." The butter had been shipped from Chicago to Detroit, consigned to B., New York, and marked "J. A. B." At Detroit B. transferred his interest to N. & H., and by them the consignment was changed to D., A. & R., New York. The Union Express Company received the butter, at Detroit, for transportation, and delivered the same to the Great Western Railway Co., to be carried by them to Suspension Bridge, in pursuance of a standing agreement for the transportation by the said rail road company of such freight as the Union Express Company should deliver to them for transportation. That company way-billed the butter to the consignees, carried it to Suspension Bridge, and there delivered it to the defendant, a common carrier of freight between Suspension Bridge and Albany, and took receipts. No other contract was made by the defendant, in respect to the transportation of the butter, except that implied from the receipt, and the fact that the butter was delivered to the defendant. The defendant made freight way-bills of the butter, which showed that the butter was in care of the Union Express Company. A part of the kegs had D. A. & R. as consignees, and 142 kegs and 15 barrels had as consignee "J. A. B., New York." The defendant carried the butter safely over its road to Albany, and delivered the same to the Hudson River Rail Road Company, a responsible carrier of freight between New York and Albany. The packages marked "J. A. B." were never delivered to D., A. & R. No express con-

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tract, by the defendant, to carry the butter to New York, was either alleged or proved. The court found that the defendant was a common carrier of freight from Suspension Bridge to Albany, but that it did not contract as a common carrier to transport the butter to New York and deliver the same to D., A. & R. The defendants, however, had notice that D., A. & R. were the consignees.

- Held*, 1. That by the delivery of the property to the Hudson River Rail Road Company, the liability of the defendant terminated, unless it omitted to give the necessary instructions to the latter company as to the delivery of the property.
2. That the defendant must be held to know who the consignees were, and it was bound to communicate that information to the Hudson River Rail Road Company; and that a failure to do so would subject the defendant to such damages as should result from its neglect.
 3. That in the absence of any proof, upon that subject, it must be presumed that the defendant accompanied the delivery of the property to the Hudson River Rail Road Company with all such instructions as the law required to be communicated; and that an action against the defendant as a common carrier, to recover damages for the loss of the butter, could not be sustained.
 4. That upon the delivery of the property to the Hudson River Rail Road Company the liability of the defendant, as a common carrier, ceased, and its further liability, if any, was as a forwarder.

What must be averred, and proved, in an action against a rail road company as a forwarder, under such circumstances.

To enable a party to recover against a rail road company that would not otherwise be liable, under section 53 of the general rail road act, (1 *R. S.* 4th ed. p. 1240.) the liability must be averred in the complaint. If no such case is contemplated at the time of commencing the action, or stated in the complaint, the whole nature and form of the action cannot be afterwards changed, in order to make the defendant liable under that section.

APPEAL from a judgment rendered at a special term, after a trial at the circuit before a judge without a jury. The pleadings were in substance as follows: The complaint alleged, substantially, that on the 2d day of February, 1855, the plaintiff caused to be delivered to the defendant, as common carrier, 142 firkins and 15 barrels of butter, of the value of \$3051.17, to be safely conveyed and transported from Suspension Bridge to New York, and there delivered to the plaintiff, conformably to his directions in that behalf. The breach alleged was that the defendant did not convey to New York and there deliver the butter to the plaintiff. The answer, first, put in issue

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each and every allegation in the complaint; and secondly, averred that on the 15th day of August, 1854, the defendant made a contract with the 'Union Express Company, engaged as common carriers in the transportation of freight between Detroit and New York, by which the defendant agreed with said express company to furnish cars for the transportation of goods consigned to said express company, and delivered by its agents at either of the warehouses of the defendant at Albany, Buffalo or Suspension Bridge, and that the defendant would *forward such through freight* as the said express company might deliver at the aforesaid warehouses, with all possible dispatch, by the first freight train, after loading the same. It was further provided, that *messengers in charge of the said express company's freight might accompany the same free of charge, for the purpose of preventing delay on the road, and generally aiding in facilitating the transit of goods.* It was further provided, that all reasonable facilities should be given by the said express company to enable it to keep its lots of freight together from the point of shipment to the place of destination. It was further agreed, that when freight was received from other lines, the defendant would pay back charges thereon, provided the bills of charges accompanied and represented distinct lots of goods, *and would forward the same across the defendant's road* at the rates furnished the defendant by the express company, which fares were not to be less than the regular tariff rates of the defendant, together with the amount of such back charges as the defendant should pay upon the same, and that the excess of charges over and above the tariff rates of the defendant were to be paid monthly to the express company. The answer further averred, that this contract had been since its date, and was still, in force. That the butter mentioned in the complaint was, on or about the second day of March, 1855, at Detroit, delivered by the persons claiming to be owners, to the said Union Express Company for transportation to the city of New York, and that the same was so transported. That pursuant to the contract with

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the express company, the defendant furnished cars at Suspension Bridge for said company, and in which the butter was under the said contract safely transported to Albany, and then and there safely and properly delivered to the Hudson River Rail Road Company. The cause was tried before Mr. Justice DAVIES without a jury, and he gave judgment for the defendant.

The leading facts of the case, as disclosed by the evidence and found by the justice, are as follows: The defendant is a rail road corporation, and a common carrier of freight between Suspension Bridge and Albany, the termini of its road. On the 15th of February, 1855, the plaintiff and his assignors delivered to the Union Express Company at Detroit, Michigan, 319 kegs and 19 barrels of butter, to be transported to Darling, Albertson & Rose, Front street, New York. The packages of butter were all marked "J. A. B., 17 Water street, New York." The butter had been shipped from Chicago to Detroit, consigned to John A. Bidwell, 17 Water street, New York, and marked J. A. B. At Detroit Bidwell transferred his interest to Norton & Hempstead, and by them the consignment was changed at Detroit to Darling, Albertson & Rose, Front street, New York. The Union Express Company is an association of express forwarders and common carriers of freight, and received the butter at Detroit, under a contract to transport the same to New York, and deliver to Darling, Albertson & Rose. On the 19th day of February, 1855, the Union Express Company delivered the butter at Windsor, Canada West, to the Great Western Railway Company, whose road runs from Windsor to Suspension Bridge, for transportation. Said company way-billed the butter to said consignees, carried it to Suspension Bridge, and there, on the 27th of February, 1855, delivered it to the defendant, and took receipts. No other contract was made by the defendant, in respect to the transportation of the butter, except that implied from the receipt, and the fact that the butter was delivered to the defendant. On the 2d of March, 1855, the defend-

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ant made freight way-bills of said butter, which remained in the hands of its agents, and accompanied the butter as far as defendant's warehouse in Albany. These bills show that the butter was in care of the Union Express Company. There were two car loads; one, having 177 kegs, had Darling, Albertson & Rose as consignees; the other, containing the 142 kegs and 15 barrels, had, as consignee, "J. A. B., New York." The defendant hauled the butter safely over its road to Albany, and delivered the same to the Hudson River rail road, and took receipts therefor. The Hudson River Rail Road Company was a responsible carrier of freight between New York and Albany. The 142 firkins and 15 barrels of butter in question were never delivered to Darling, Albertson & Rose. Each of the packages was marked "J. A. B., New York." That the defendant did not contract as common carrier to transport the butter to New York, and deliver the same to Darling, Albertson & Rose. That the butter was delivered to the defendant on behalf of the Union Express Company, and was transported over the defendant's road, under and subject to the provisions of the agreement set up in the answer, then subsisting between the defendant and the express company. The justice decided that the whole duty of the defendant was discharged by the safe delivery of the butter to the Hudson River Rail Road Company. That under the contract with the Union Express Company, the defendant discharged its whole duty by hauling the butter to Albany, and delivering the same to the Hudson River Rail Road Company. That it was not responsible to the plaintiff for the non-delivery of the butter to Darling, Albertson & Rose. Sundry exceptions were taken by the plaintiff.

Robert Dodge, for the appellant. I. The defendant contracted with the plaintiff's agent to transport the butter, in the complaint mentioned, from Suspension Bridge to New York, and deliver it to Darling, Albertson & Rose. The receipt given by the defendant upon delivery to its agent of the

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butter, in connection with its course of trade, is evidence of the contract. It specifies the number of packages of the butter, and that it was from Windsor, and for "*Darling, Albertson & Rose*, Front street, New York."

II. Whether the defendant was a carrier or forwarder merely, beyond Albany on the route to New York, it was responsible for the loss of the butter. (1.) If a *carrier*, it was bound to deliver the butter according to the instructions. The marks J. A. B. afforded no reason for changing its destination. For aught that was shown by the defendant, they were trade-marks of the consignor. (*Schræder v. Hudson River Rail Road Co.*, 5 *Duer*, 55. 6 *Binney*, 129.) (2.) If a *forwarder merely*, it was bound to forward the butter, according to the instructions, to Darling, Albertson & Rose. It did not discharge its duty by simply delivering it to the Hudson River rail road without a direction as to whom to deliver it. (3.) By chapter 270 of the laws of 1847, the defendant was answerable for the loss occasioned upon any of the lines of rail road between Suspension Bridge and New York. The two lines were "connected" at Albany. The New York Central terminates at Albany, and by the charter of the Hudson River Rail Road Company, it terminates at Albany, by means of its ferry, authorized in the act. (*Laws of 1846, ch. 216, title and § 1.*) The fact of connection also appears in the evidence. The receipts show the butter was delivered *at Albany* to the Hudson River rail road, and there is no evidence to the contrary, or to warrant the finding that it was delivered at Greenbush.

III. It distinctly appeared that the negligence of the defendant's servants caused the loss of the butter. It was first misdirected in the defendant's way-bill from Suspension Bridge, where it is entered as for "J. A. B.," New York. The delivery was again made at Albany to the Hudson River Rail Road Company, with directions to deliver it, not to Darling, Albertson & Rose, New York, but to "J. A. B.," New York. This appears from the receipts.

IV. The contract between the Union Express Company and

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the defendant does not vary the liabilities of the defendant. (1.) The Union Express Company were *forwarders*, and not carriers. The testimony of G. E. Jarvis, on cross-examination, shows "their business is *forwarding* freight." The receipt given by the express company's agent is of the butter, "*to be forwarded*." There is no evidence to show the express company was a carrier. (2.) The contract between the defendant and the express company, does not indicate that the express company was not a mere agent to forward freights.

V. The justice who tried the cause erred in his finding that the Union Express Company is an association of common carriers, and that it received the butter under a contract to deliver it to the consignees. There is no evidence in the case that the Union Express Company are carriers.

VI. As forwarders, the Union Express Company were the agents of the plaintiff, and the fact that by their contract with the defendant the agents of the company were permitted to accompany the freight forwarded, did not excuse the defendant from its responsibility for the safe carriage and delivery of the butter. (*Hollister v. Nowlen*, 19 *Wend.* 236. *Cole v. Godwin*, *Id.* 251. *Merch. Bank v. Steam Nav. Co.*, 6 *How.* 344. *Dorr v. Same*, 1 *Kern.* 485. *Stoddard v. Long Island R. R.*, 5 *Sandf.* 180. *Green v. Clarke*, 2 *Kern.* 343.) There was no duty on the part of the agents, the express company or the plaintiff, to watch the butter and see if the defendant did not misdirect or misdeliver it. The butter was exclusively in the defendant's possession, and not in that of the company. The course of business and the receipts show this, and they are consistent with the contract between the express company and the defendant. There was no proof that either party ever acted under this alleged agreement, or that the same existed in force at the time of this shipment. There is no contract in form proved. It is at most a mere license to the express company, and not even their assent is shown. It is at most a mere offer, a proposition, and there is no pretense that the owner of the goods, the appellants, had any

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notice thereof; it is kept secret, to be used by the respondent as the means of evading its legal liability. The alleged agreement offered by the defendant on trial, and admitted by the justice, was irrelevant, immaterial and inadmissible, and should have been excluded. The appellant's exception, therefore, was well taken.

VII. The justice trying the cause erred in each of his conclusions of law; and the exceptions thereto, and to his findings of facts, are well taken. (1.) The defendant's duty was not discharged by delivering the butter to the Hudson River Rail Road Company. He delivered it to the Hudson River Rail Road Company to carry to some other person than the consignee, and thus rendered it certain that the consignee would never receive it. (2.) It did not discharge its duty by carrying the butter to Albany, and making the delivery it did. It might as well have delivered it to any person at Albany calling himself J. A. B. (3.) It is responsible for the non-delivery of the butter to Darling, Albertson & Rose, and the plaintiff was entitled to judgment.

John H. Reynolds, for the respondent. I. The defendant was a common carrier between Suspension Bridge and Albany, and not elsewhere. The butter was delivered to it at Suspension Bridge, for Darling, Albertson & Rose, New York. There was no special contract with respect to the transportation and delivery of the butter. It was simply delivered by the Great Western Railway, and received by the defendant; the receipt indicating that the butter was intended for Darling, Albertson & Rose, New York, and the only contract which arises is that which is implied by law in such a case. (1.) The obligation assumed by the defendant under such circumstances was that of common carriers over its road to Albany, and from thence as *forwarders* merely, and the liability of the defendant was discharged by delivery of the butter to the Hudson River Rail Road Company, or to any other solvent carrier, for transportation to New York. This is the settled rule of

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the American courts. (*Van Santvoord v. St. John*, 6 Hill, 157. *Farmers' & Mechanics' Bank v. Ch. Trans. Co.*, 16 Verm. R. 52. 18 *id.* 131. 23 *id.* 186. *Hood v. New York and New Haven R. R. Co.*, 22 Conn. R. 1, S. C. 22 *id.* 502. *Nutting v. Conn. R. R.*, 1 Gray, 502. *Jenneson v. Camden and Amboy R. R.*, Am. Law R. 234. *The Naugatuck R. R. Co. v. The W. Button Co.*, 22 Conn. R. 468.) (2.) There is nothing in this case to show that the defendant was a carrier beyond its terminus, or that in this instance it agreed to become so, or that it had any connection in the business of transportation with any other carrier; hence there is nothing upon which an implied contract to carry beyond its terminus can be predicated. In the case of corporations, authorized by law to carry on their business of common carriers between certain points, it is not to be presumed that they are exceeding their powers and carrying on business outside of their legal limits. (3.) It may be admitted that the English rule differs in some respects from that adopted by the American courts. But even under the English rule this action could not be maintained against the defendant. For by that rule it is the *first* carrier who receives the goods marked for a particular destination, that is held as a carrier for the whole route. That rule, applied here, would make the Great Western Railway Company alone responsible to the plaintiff. (*Hodges on Railways*, 615. *Muschamp v. Lancaster and Preston R. R.*, 8 Mees. & Wels. 241. *Watson v. Ambergate, Not. and Boston R. R.*, 3 Eng. Law and Eq. 49. *Scotthorn v. South Staffordshire R. R.*, 18 *id.* 553. *Wilson v. York N. and B. R. R.*, *Id.* 557.)

II. If the contract implied by law be such as is contended for, that of a carrier to Albany, and from thence mere forwarders, then the case made by the complaint is not in any material respect sustained. The cause of action stated in the complaint is upon a contract at Suspension Bridge to carry over the whole route to New York, and there deliver to the consignee, and a breach in not delivering is alleged. No such contract is made out in substance or legal effect, and the com-

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plaint is "unproved in its entire scope and meaning." (*Code*, § 171.) (1.) It is not a variance which can be disregarded, nor can it be remedied by amendment. The breach alleged in the complaint is *in not carrying to New York and delivering to the consignees*. No contract to carry to New York and deliver to the consignees being proved, the whole cause of action, in its entire scope and meaning, fails. (2.) If the contract had been set out in the complaint as it really was, to carry to Albany and then deliver to another safe carrier for transportation to New York, the whole character of the action would have been changed. A different rule of liability would obtain, and different evidence would have been required to maintain such a complaint, and this serves to illustrate the difference between the case stated in the complaint and that which the plaintiff attempted to prove. (3.) The complaint did not, in the remotest degree, indicate the real nature of the plaintiff's case. It cannot be regarded as a good pleading or any proper or intelligent statement of the case, except it be held that the proof makes out a contract by the defendant to carry beyond its terminus and deliver in New York. If the plaintiff has failed in this, the whole action is gone. (4.) The whole case (saving the effect of the contract with the Union Express Co.) turns upon the nature of the contract to be implied by law from the mere receipt of the butter at Suspension Bridge, consigned to New York. If the proof makes out the contract alleged in the complaint, the proof that it was not delivered to the consignees in New York makes out the case. If, on the contrary, the law implies no such contract to carry to New York and there deliver, then no case is made out, and the action wholly fails; because if no contract to deliver in New York was made, the defendant is certainly not liable in damages by showing that the goods were not delivered in New York. If the contract made was violated upon a proper complaint, sustained by the requisite proof, the defendant might be held responsible for such default. (5.) If our construction of the implied contract prevail, then we insist

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that the proof does not make out any violation by the defendant, and no recovery can be had. The defendant did carry the butter safely to Albany, and did there deliver it to the Hudson River Rail Road Company. So far there is no dispute nor room for any. In the absence of any pretense of a misdirection of the goods, there could be no doubt but that the liability ceased. But it is said, as the ground upon which the defendant is liable, that the consignment was changed at Suspension Bridge from "Darling, Albertson & Rose," to "J. A. B., New York, by the defendant's agent. The only proof is, on this point, the "freight way-bill," between Suspension Bridge and Albany, over the defendant's road, in which "J. A. B., New York," is placed where it is claimed "Darling, Albertson & Rose" should have been. This way-bill purports to be, and is, a way-bill over the defendant's road between Suspension Bridge and Albany, and never went beyond Albany, and there is no proof that this paper was ever seen by any agent of the Hudson river road, and it cannot well be inferred that they were misled by it. Nor is there any proof that the butter went into the hands of "J. A. B." All we know is, that it did not reach "Darling, Albertson & Rose." We may as well infer, upon the proof, that the butter is in the Hudson river, as that it went to "J. A. B." (6.) Any misdirection of the butter would not subject the defendant to an action, unless it contributed to the loss. Here it is not shown that it did. Our way-bill never went beyond Albany, and it is not shown that the butter went into the wrong hands, which is the only consequence of a misdirection. If the plaintiff relies upon the misdirection, he should show that by reason of it the goods failed to reach the proper party. If the goods were stolen at Rhinebeck from the Hudson River rail road, it would be absurd to hold the defendant liable, because an agent at Suspension Bridge put the name of a wrong consignee on the way-bill. To make the defendant liable for a negligent or improper direction being given to the goods, it must be shown that the loss, which did happen, was in some degree

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occasioned by the negligent act complained of. In this respect there is a fatal defect in plaintiff's proof. So that if it be that the defendant was a mere *forwarder* from Albany, it is not shown that any misdirection was given to the Hudson river road, or if given, that it in any respect contributed to the loss. The *onus* was in both these particulars upon the plaintiff; as a *forwarder* is only responsible for *negligence*, and the party alleging it must *prove* it, to make out his case. It cannot in this, more than in any other case, be inferred. (*Midland Railw. Co. v. Bromley*, 33 *Eng. Law and Eq.* 235.) (7.) The receipts taken of the Hudson River rail road are each in the following form: "Rec'd of N. Y. C. R. the following property, which we agree to forward *as addressed*," "marked J. A. B., N. Y.;" "description of property," butter, &c. This does not show any *misdirection*. The *address* of the goods was different from the *marks*. They were all marked "J. A. B.," but really *addressed* at Detroit to "Darling, Albertson & Rose." The marks on the property were correctly given in the receipts, but what *address* for the property was given by the defendant to the Hudson River rail road is not shown. It is presumed to have been the correct one. The receipts were taken by the cartman, as a load was delivered. The direction as to whom the property is to be forwarded is a separate transaction, and that direction should contain a statement of the back charges for transportation, and the name of the consignee and place of destination, &c. A receipt of the property thus marked affords no more evidence of a wrong direction as to its destination, than is afforded in the freight invoice of the Great Western road, where the marks "J. A. B." also appear. The "mark" in such case only serves to identify the goods. It is obvious, also, that if any mistake occurred in the direction of the goods, it arose in some degree from the fault of the owners, by permitting the marks "J. A. B., N. Y.," to remain on the packages, after the consignment had been changed at Detroit. This was negligence of the owners, and if in consequence of this there was a misdelivery, the carrier

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is not responsible. (*Angell on Carriers*, § 136. *The Huntress, Davies' Dist. C. Rep.* 83.) For these reasons, and independent of the contract with the express company, the defendant is not responsible, and the judgment should be affirmed.

III. It is further submitted that by virtue of the contract with the express company, under which the defendant received and carried the butter over its road, the plaintiff was not entitled to recover. (1.) That the Union Express Company contracted with the owner to transport the goods to New York is proved and undisputed. That the butter was transported by the defendant under its contract with the express company is also beyond dispute. The plaintiff, in this aspect of the case, stands precisely in the same position as the Union Express Company would have done if they had brought this action. (*The New Jersey Steam Nav. Co. v. The Merch. Bank of Boston*, 6 How. U. S. R. 344. *Stoddard v. The Long Island R. R. Co.* 5 Sandf. S. C. R. 180.) (2.) By this contract the defendant agrees "to furnish cars for the transportation of goods consigned to said express company and delivered by the agents of said company at our warehouses, at Suspension Bridge, Buffalo and Albany," and also, they "farther agree to forward all such through freight as the said express company may deliver at the above named warehouses with all possible dispatch," &c. And "messengers in charge of the said express company freight may accompany the same free of charge, for the purpose of preventing delays and aiding generally in the transit of the goods." And "when freight is received from other lines, this company will pay the back charges thereon, (provided the bills of charges accompany and represent distinct lots of goods,) and will forward the same across our road at the rates furnished by the said express company," &c., and then monthly settlements are to be made. (3.) It is obvious that this contract intended to, and does, restrict and limit in some respects the liability of the defendant as common carrier with respect to freight of the express

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company. A carrier may thus limit his common law responsibility. (*Dorr v. The Steam Nav. Co.* 1 Kern. 485.) The provision that the rail road company will *furnish cars*; that messengers of the express company *in charge* of the freight may accompany it free of charge, to aid generally in its transit, and that freight received from other lines will be *forwarded* over defendant's road, shows that all such freight was in the care and management of the immediate agents of the express company, and that the rail road company had only to *furnish cars*, and *forward* the freight thus attended *over its road*. No duty of directing, managing or *consigning* the freight, was imposed upon the defendant. That duty was to be attended to by the immediate agents of the express company, by whom it was accompanied, *and in whose charge it was*. The freight way-bill over the defendant's road stated the butter to be "in care of the Union Express Company," and it passed over in such care. The defendant hauled it to Albany and delivered it to the Hudson River road, and that certainly discharged the whole duty under the contract. The agents of the express company gave the Hudson River road such directions as they pleased, or attended it in person on its journey from Albany to New York. If they failed to do either, or gave a wrong direction, it was their fault, not the defendant's, as under the contract no such duty was assumed. If this be the meaning of the contract, there can be no doubt but that the defendant is excused from all liability for misdirection or misdelivery in New York. That the immediate agents of the express company *in charge* of the freight could give it such directions as they pleased, is quite clear, and in that the defendant had no concern and owed no duty. Besides, the contract plainly implies that the defendant was a mere forwarder or agent, furnishing the cars and motive power for hauling the freight and messengers over the road, and that being done, all its duty and responsibility ended.

Upon this view the case is clearly against the plaintiff, and the judgment should be affirmed.

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By the Court, MULLIN, J. I shall assume, for the purposes of this case, that the plaintiff was the owner of the property in controversy, and that it was delivered to the defendant at Suspension Bridge, with notice that Darling, Albertson & Rose, Front street, New York, were the consignees. The plaintiff alleges in his complaint that the said property was delivered to the defendant at Suspension Bridge to be safely and securely carried, conveyed and transported by the defendant from Suspension Bridge to the city of New York, there to be safely and securely delivered in good order and condition, for the plaintiff, conformably to his orders and directions in that behalf. And the plaintiff further alleges, that the defendants so carelessly and negligently conducted themselves in the premises that said goods were lost.

No express contract by the defendant to carry said property to New York is either alleged or proved. It is found by the justice who tried the cause that the defendant was a common carrier of freight from Suspension Bridge to Albany, the termini of their rail road, and that the defendant *did not contract* as a common carrier to transport the butter to New York and deliver the same to Darling, Albertson & Rose. The court also found that the defendant hauled the said butter safely over its road to Albany, and safely delivered the same to the Hudson River Rail Road Company, and took receipts therefor. The liability of the defendant must rest, therefore, on the contract which the law implies, or the duty which the law imposes upon it, by the receipt of property to be carried over its road.

The court of errors in *Van Santvoord v. St. John*, (6 Hill, 157,) defines the duty of the carrier in these words: "Where goods are delivered to a carrier marked for a particular destination, without any direction as to their transportation and delivery save such as may be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged, whether the consignor knew of the usage or not."

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It was further held, in that case, that where goods marked for Little Falls were delivered to a line of tow boats, running between New York and Albany, for transportation, and the goods were carried to Albany and then delivered to a canal line of boats to be transported to Little Falls, and it appeared that this was the usual course of business, the defendant had discharged its whole duty, and was not liable for a loss happening between Albany and Little Falls.

I cannot perceive any difference in principle between the case cited and the case in hand, and it must therefore be held conclusive, unless there is some fact in this case not yet alluded to which will distinguish it from *Van Santvoord v. St. John*. I will now allude to the only remaining facts that can be relied on to take this case out of the principles of the case cited; and they are these. That the goods, when they were delivered to the Great Western railway, to be carried from Detroit to Suspension Bridge, were entered on the freight bills as consigned to Darling, Albertson & Rose, New York. The receipts given by the defendant's agent to the Great Western road were upon the freight bill, or a copy thereof, in which the goods were entered as consigned as aforesaid; that a portion of the property was entered in the freight bills accompanying the property over the defendant's road from Suspension Bridge to Albany, as consigned to said Darling, Albertson & Rose, and another portion for J. A. B., New York; and that in the receipts taken by the defendant from the Hudson River road, the property is all described as marked J. A. B., N. Y. In other words, that the defendant had notice that D., A. & R. were the consignees—a fact which I have assumed to be established in the case.

By the delivery to the Hudson River road, the liability of the defendant terminated, unless it omitted to give the necessary instructions to the Hudson River Rail Road Company, as to whom to deliver the property.

The receipts taken by the defendants from the Hudson River rail road are the only evidence given on this point, and there is

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no finding by the court on the question. This omission (if there was one) was a breach of duty and is not to be presumed. The freight bill which the Hudson River road sent forward with the property would be the best evidence of the omission. But this bill is not introduced, nor is any agent or officer of that road or of the defendant called to speak on the subject. It seems to me, therefore, that we must presume that the defendant accompanied the delivery of the property to the Hudson River Rail Road Company, with all such instructions as the law required the defendant to communicate. (*Newton v. Pope*, 1 Cowen, 109. *Schmidt v. Blood*, 9 Wend. 268. *Foote v. Storrs*, 2 Barb. 326. 1 Cowen & Hill's Notes, 298.)

The letters J. A. B. on the boxes would not enable the Hudson River Rail Road Company to make a proper delivery of the property ; and I apprehend no company having any knowledge of its legal rights and liabilities would receive property and assume the risk of a wrong delivery, without other means of protection than such marks would afford.

The defendant must be held to know who the consignees were ; and it is doubtless the law that they were bound to communicate this information to the Hudson River Rail Road Company, and that a failure to do so would subject them to such damages as should result from its neglect.

If we are right in presuming that the defendant performed its duty in this behalf, then this action cannot be sustained. If, however, we are mistaken in holding that the defendant must be held to have performed its duty, and that the burthen is thrown upon it to show that it communicated to the Hudson River Rail Road Company the name and residence of the consignees, and that in this case no such proof is given, it then remains to inquire whether on the evidence the plaintiff is entitled to recover.

Within the case of *Van Santvoord v. St. John*, the liability of the defendants as *carriers* had ceased, and their further liability, if any, was as forwarders. The complaint is not framed with a view to liability in that character, and I am not

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prepared to hold that the complaint could, by amendment, be made to charge them in their character as forwarders. If an action was brought against the defendant as a forwarder, to recover for the loss of these goods, the complaint must allege the delivery of the property to the Hudson River Rail Road Company for transportation to New York, and that the defendant did not inform them that Darling, Albertson & Rose were the consignees; and that by reason of such omission the goods were delivered to the wrong persons, or otherwise lost to the plaintiff. The averments thus made must be proved. If, then, the question of pleading were out of the way, is there any proof in this case which would justify the finding of the facts necessary to support a judgment against the defendant for the omission suggested? There is not a particle of proof that the loss resulted from the omission charged. For aught appearing, the goods may have been stolen on their way to New York, or sunk in the Hudson river. The court cannot presume, in the absence of all evidence that there was a breach of duty on the part of the defendant, that such breach was the cause of the loss. The property being clearly traced in good order into the custody of the Hudson River Rail Road Company, and thus, as it would appear a perfect remedy given to the plaintiff, it cannot be necessary to infringe on the well settled principles of the law, to afford the plaintiff a remedy.

It is urged, by the appellant's counsel, that although there may be a right of action against the Hudson River Rail Road Company, yet an action may be maintained against the defendant under section 53 of the general rail road act. (1 *R. S.* 4th ed. 1249.) That section provides, that "whenever two or more rail roads are connected together, any company owning either of said roads receiving freight to be transported to any place on the line of either of said roads so connected shall be liable as common carriers for the delivery of such freight at such place." It may be assumed that the roads of the defendant and of the Hudson River company are connected, within

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the meaning of this statute. To recover, under this statute, against a company that would not otherwise be liable, the facts required to constitute the liability must be averred in the complaint. No such case is made in the complaint in this action, and it is quite obvious from the complaint and trial that no such case was contemplated when the action was commenced or tried. And the whole nature and form of the action cannot and ought not now to be changed in order to make the defendant liable for a loss with which it had no manner of connection.

The judgment must, for these reasons, be affirmed with costs.

[NEW YORK GENERAL TERM, November 4, 1858. *Davies, Clerke and Mullin, Justices.*]

PLACE vs. THE BUTTERNUTS WOOLEN AND COTTON
MANUFACTURING COMPANY.

A stockholder in a corporation is a *party* to a suit brought against such corporation. BALCOM, J. dissenting.

A judge, or a justice of the peace, cannot sit as such in a cause to which a corporation is a party, if he be related to a stockholder in such corporation. BALCOM, J. dissenting.

The defendant may prove the existence of such relationship, although there is no plea to the jurisdiction of the justice, or answer setting up the fact to be proved, in order to deprive the justice of jurisdiction.

THIS was an action commenced before a justice of the peace of Otsego county, to recover for work and labor. The defendant, by his answer, denied the complaint, and claimed to set off demands against the plaintiff. On the trial the defendant moved the court to dismiss the action, on the ground, among others, that a brother of the justice was one of the stockholders in the corporation which was the defendant, and offered to prove that such was the fact. The justice refused

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to dismiss the action, and excluded the proof offered. The jury rendered a verdict for the plaintiff for \$18.67, and thereupon the justice gave judgment against the defendant, who brought an appeal to the Otsego county court. That court affirmed the judgment, and the defendant appealed to this court.

Benjamin Estes, for the appellant.

Charles A. Brown, for the respondent.

MASON, J. At common law it was no disqualification in a justice of the peace to try a cause that he was related in any of the degrees of consanguinity, or was of affinity to either of the parties. (*Pierce v. Sheldon*, 13 John. 191. *Eggleston v. Smiley*, 17 id. 133.) It is declared by statute, with us, that no judge of any court can sit as such in any cause to which he is a party, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties. (2 R. S. 204, § 2, 2d ed.) And this statute was held in the case of *Edwards v. Russell*, (21 Wend. 63,) to embrace a justice of the peace, and to be applicable to courts held by justices of the peace; and that decision was affirmed in the case of *Foot v. Morgan*, (1 Hill, 654.) Those are both cases where the disqualification arose from the fact that the justice was related to one of the parties within the ninth degree. As there was no disqualification at common law in the justice's trying the case at law, the authority of the justice must be determined by the statute itself. The objection raised to the jurisdiction of the justice in the case at bar is, that his brother is a stockholder in this corporation—the defendant in this suit. The statute declares he shall not sit in a case where he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties. (2 R. S. 204, § 2.) The real question in the case is, whether a stockholder in a corporation can be said to be a party, within the meaning of the statute.

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My brother GRAY thinks he is, while my brother BALCOM, on the contrary, thinks he is not; and they have each vindicated their opinions by very plausible reasons, to say the least, and I have found myself, while examining the question, sometimes upon the one side and sometimes on the other. I think, however, that my brothers GRAY and BALCOM may be pardoned for differing, and I for doubting, as it is a question over which the most distinguished of our judges in this state have differed. It is a principle of the common law that a judge has no power to decide his own case, or a case in which he is a party to the suit. (*Finch's Law*, 19. 4 *Co. R.* 118. *Wingate's Maxims*, 170.) By an early statute in this state it was provided, "that when the chancellor shall be a party to a suit in chancery the bill shall be filed before the chief justice of the state, who shall thereupon proceed in like manner as the chancellor could of right do," &c. In the case of *Stuart v. Mechanics and Farmers' Bank*, (19 *John.* 495,) which was the case of an appeal from the chancellor, it appears from the report of the case, page 501, that when the case came on to argument before Chancellor Kent, he stated to the counsel that he was a stockholder in the Mechanics and Farmers' Bank—the defendant in the suit; and referring to the above statute, which declares that when the chancellor shall be a party to a suit in chancery the bill shall be filed before the chief justice, declared himself in doubt whether he had jurisdiction of the case; but the argument was proceeded with, upon the understanding that the chancellor should call upon Chief Justice Spencer for his opinion in the case and confer with him upon the question. He did so, and the chief justice declared his opinion that the chancellor was not a party within the meaning of the statute, and that the chancellor had exclusive jurisdiction in the case. In this opinion the chancellor concurred, and went on and decided the case, and made a decree therein. This case was decided by Chancellor Kent, in May, 1821. This same question came before Chancellor Kent's successor, one of the most learned and pure minded jurists that ever presided in that court. In

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1823, in the case of *The Washington Ins. Co. v. Price*, (1 *Hopkins*, 1,) when the cause was moved, the chancellor informed the counsel of the parties that he was a stockholder in the corporation, which was the plaintiff in the suit, and that, according to the opinion which he then entertained, he could not hear the case; and expressed a desire that the question be argued, but the counsel declined, and the chancellor took the case, and, in a very chaste and elaborate opinion, devotes himself very closely to the question whether, under the statute which declared that when the chancellor shall be a party to a suit in chancery, the bill shall be filed before the chief justice, he, the chancellor, had jurisdiction, and came to the conclusion that the bill must be filed before the chief justice. He refers to the case of *Stuart v. The Mechanics' and Farmers' Bank*, (19 *John*. 501,) and declares that while he entertains the highest respect for his predecessor and the chief justice, and while he has delighted to honor them for the ability, intelligence and integrity with which they have discharged their respective trusts, and while he has felt that he had strong authority when able to produce their opinions in support of his own decision, yet so clear and undoubting was he in the opinion that the chancellor, being a stockholder, was a party to the suit, within the spirit and meaning of the statute, that he could not surrender it to the opinion of these two distinguished jurists, and declined to entertain the case; and expressed the opinion that the chief justice had exclusive jurisdiction in the case. I am convinced that Chancellor Sanford was right in not following the decision of his predecessors; and in refusing to entertain the case. I am greatly strengthened in this conclusion by the case of *Foot v. Morgan*, (1 *Hill*, 654,) where the court held that the statute extended to the party beneficially interested, and included the real party in interest, although he was not a party in fact to the suit.

The decision of the chancellor in 1 *Hopkins*, 1, is, in my judgment, decisive of the case at bar, and ought to guide us in the construction of a similar statute, which declares "that

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no judge of any court can sit as such in any case in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties." Now if a stockholder is deemed a party to the suit, within the intent and mischief of this statute, then it is very clear that the justice had no right to try this suit; for he is disqualified to sit as a juror where his brother is a party. (*Post v. Black*, 5 *Denio*, 66.) I am inclined, therefore, to hold that this statute disqualifies a justice of the peace to sit in a case where a corporation is a party and his brother is a stockholder therein. I have examined the case of *The Bank of Lansingburgh v. McKie*, (7 *How. Pr. Rep.* 360,) where a different view was taken of this statute by Justice Harris; but as that is a special term decision, it is not to be followed by us *in banc*, unless we are satisfied it is rightly decided. And I am constrained for this reason to repudiate the case as authority, and I advise that the judgment of the county court and that of the justice be reversed.

H. GRAY, J. By statute, no judge of any court can sit in a cause in which he would be excluded from being a juror by reason of his consanguinity or affinity to either of the parties. (2 *R. S.* 204, § 2, 2d ed.) This prohibition comprehends all courts, including as well a court held by a justice of the peace as the court of last resort. (*Edwards v. Russell*, 21 *Wend.* 63. *Foot v. Morgan*, 1 *Hill*, 654. *Oakley v. Aspinwall*, 3 *Comst.* 547.) Before the commencement of the trial the defendant asked the justice to dismiss the cause, upon the ground that the justice's brother was a party defendant, being one of the stockholders in the company sued, and offered to prove the fact upon which the motion was based. The justice excluded the offer, and overruled the motion. This ruling is sought to be upheld upon two grounds: 1st. That a stockholder in a corporation sued is not a party to the suit, within the meaning of the statute referred to. 2d. That the offer made was properly rejected upon the ground that no issue was made by the pleadings, involving the jurisdiction of the justice.

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The plaintiff assumes that in order to disqualify the justice from sitting he must be related, within the forbidden degree, to the party on record, or that the suit must have been defended, in the strictest sense, for the immediate benefit of his relative; and for the purpose of showing that the justice's brother is not either a party to the record or a person for whose benefit the suit is defended, we are referred to a class of cases arising under sections 298 and 390 of the code, prohibiting the exclusion of a witness by reason of his interest in the event of the action unless he is a party to the action, or a person for whose immediate benefit the action is prosecuted, or defended. In *Pack v. The Mayor of New York*, (3 Comst. 493,) Bronson, justice, citing the code, says, interest alone, however direct, is no longer a ground of excluding a witness. In the case of *The Montgomery County Bank v. Marsh*, (3 Seld. 481,) it was held that a stockholder was not a person for whose immediate benefit the action was prosecuted. The learned judge who delivered the opinion of the court did not reason the case, but thus declared the law. In *Freeman, executor, v. Spalding*, (2 Kern. 373,) a legatee of the testator was held to be a competent witness, upon the ground that the code only excluded persons who are absolutely entitled to the proceeds of the litigation, not those who are ultimately entitled to receive them from the party to the action. The learned judge, who delivered the opinion of the court, held that the code applied to a person into whose hands the money collected will necessarily go when it is received, or to the person who might take it from the sheriff or attorney as his own; that it does not apply to one into whose hands the money cannot go immediately, and hence does not apply to a stockholder, although he has an immediate and certain interest in it, which may ultimately carry it into his hands. These cases have given the statute admitting interested witnesses a liberal construction in favor of the party calling them, and have settled the law in substance to be, that however clear and direct the interest may be in sustaining the defense, if an execution for

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the recovery cannot issue against the witness, the defense is not for his immediate benefit; or if he has not a right to take the sum recovered by the party calling him immediately from the officers of the court, although he may be entitled to the proceeds of it directly from the party, he is not a person for whose immediate benefit the action is prosecuted. Technically speaking, the justice's brother, though a stockholder, is not a party to this suit, for the reason that he is not named upon the record. His interest is merged with that of others in corporate stock; all of whom act as one person through the officers that represent them. Each, to a certain extent, has lost his individuality, and all, by fiction of law, are known as one person, by a corporate name, by which they prosecute and defend. If unsuccessful, no one of them is liable to execution against him personally; if successful, neither has the right to take the money from the officers of the court; but where a director is to be chosen, or a dividend is declared, or the stock has increased in value by reason of the recovery, he becomes again a real person, and may, as an individual, assert and maintain his right to vote, to his dividend if he pleases; and avail himself of the enhanced value of his stock in market.

The charge of the law in relation to the admissibility of witnesses should increase rather than diminish the anxiety of courts so to administer the laws intended to secure impartial trials, as to exclude from the jury box those who are not free from bias or partiality to the party beneficially interested. Interest in the event, in proportion to its different degrees, goes to the credit of the witness; and the only safeguard against its mischievous consequences is, that the evidence is to be weighed and all proper allowances made on account of interest by an impartial court or jury; and no one should sit as a judge or juror who is within the forbidden degrees of consanguinity to the party beneficially interested, unless the interest is so remote and contingent that there is no apparent danger of bias. Whether the party interested can take the recovery from the officers of the court, as his own, or is liable

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to an execution upon the judgment recovered, is no real test of the degree of interest he may have in the controversy. He may have a small immediate interest and a less ultimate one; or he may derive no immediate benefit, and still have a fortune at stake. Some of the stockholders in the New York Dry Dock Bank, in the recent controversy between that institution and the American Life Insurance and Trust Company, (3 *Comst.* 344,) offered an illustration of the partizan interest and direct benefit stockholders derive from a litigation prosecuted in their corporate name, and of the almost imperceptible difference in point of time between the immediate benefit to the party on record and the ultimate benefit of the stockholders who were beneficially interested. The party on record was a mere legal entity created by law. The stockholders were the only persons, connected with it, having any substantial interest. Take that case as an illustration, under our liberal laws for the admission of interested witnesses; allow the stockholders to testify to the usury there set up, and their brothers to sit as jurors, and nothing would remain to be done to shock the moral sense of the public. A tribunal thus constituted would not, with any truth or sense of propriety, be called a tribunal of justice. Or, in the case of *Freeman v. Spalding*, (*supra*,) let the brother of the legatee who was a witness sit as a judge, and unless divested of the frailties common to his race, the chances of injustice would not be diminished. The law, as drawn, is in nowise discourteous to jurors, as between parties who take the recovery directly from the officer of the court, and those who as between them and the party in whose favor the recovery is had, is entitled to it. The party who takes it from the court, or its officers, holds it for the benefit of the other whose corporate riches are increased by it. Nor does it limit the prohibition to relations of the parties on the record: if the justice be related to the parties beneficially interested, though not a party to the record, he cannot sit. (*Foot v. Morgan*, 1 *Hill*, 654.) Nor can he sit if related to the party on record, within the forbidden degrees, though he fully indem-

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nified against all costs and damages and urged to sit by the other side. (*Oakley v. Aspinwall*, 3 Comst. 547.) I cannot concur in the opinion expressed in the case of the *Lansingburgh Bank v. McKie*, (7 How. Pr. Rep. 360.) A stockholder in a bank has no certain or immediate interest in the event of a suit prosecuted or defended by the bank, and hence is not a party beneficially interested. Although frequent instances have occurred of the insolvency of banks and manufacturing companies, they are not so frequent in proportion to the number engaged in their respective enterprises that they, more than an individual, should be presumed to be insolvent. The presumption of law is in favor of individual solvency. (*Ingals v. Lord*, 1 Cowen, 240.) And as a general rule, presumptions which can apply to corporations as well as individuals, apply alike to both, in a gain or loss; and in a solvent corporation each stockholder has a certain interest, though not certain as to amount; and it may be immediate, though not necessarily so. The decision of the justice in this case was against the interest of his brother; that, however, does not change the question. His relationship to a party beneficially interested was a legal prohibition of his right to sit. The presumption of bias could not be repelled by his impartial acts, for the reason that he had no right to act. (*Oakley v. Aspinwall*, 3 Comst. 547.) We are not, therefore, called upon to determine whether he acted well or ill; the meaning of the statute, says Cowen, justice, in *Edwards v. Russell*, (21 Wend. 64,) is not merely that the interests of the party are unsafe, but the general interests of parties. The points made by both parties show that the want of an issue in the pleadings, involving the jurisdiction of the justice, was an after-thought and raised now for the first time in the cause, to uphold his ruling in excluding the offer to prove him to be the brother of one of the parties beneficially interested. No issue was necessary, for the reason that his acts were void: and whether the objection was raised on the trial or not, they could be inquired into collaterally. In *Edwards v. Russell* there was no

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issue involving the relationship; but after issue, as in this case, the objection was raised that the plaintiff and the justice were cousins. No evidence was given, but the justice said it was alleged by the objectors that he and the plaintiff were cousins; that such was the general understanding, and gave judgment against the plaintiff for costs. This court acted upon what was said by the justice, and held that enough was collectable from the return to warrant the conclusion that the relationship was admitted by him, and affirmed the judgment. In *Post v. Black*, (5 *Denio*, 66,) nothing was said on the trial touching the alleged relationship, but the affidavit upon which the certiorari was allowed stated the relationship, and the justice in that case, as in duty bound, stated his relationship to the party, and the judgment was reversed. All that is necessary to be known to overturn the judgment in such a case is, that the justice is related to one of the parties, and it matters not how or when it is shown, provided it comes in such shape as to entitle it to credit. No issue was necessary to admit the proof offered. (2 *Cowen's Treatise*, 3d ed. 334.) I am, therefore, of opinion that the judgment of the county court, and that of the justice, should be reversed.

BALCOM, J., dissenting. The return of the constable, indorsed upon the summons, is to the effect that the same was personally served by him on the 9th day of August, 1855, by delivering a copy of the same to James R. Morris, president of the company, and Stephen Estes, clerk. The return was sufficient to give the justice jurisdiction of the defendant. (*The New York and Erie Rail Road Co. v. Purdy*, 18 *Barb.* 574.) The service of the summons on the defendant's clerk was a nullity; (5 *How. Pr. Rep.* 183; 6 *id.* 308;) but the service of it on the defendant's president was all the service that the code requires. (*Code*, § 134, *sub.* 1. 9 *How. Pr. Rep.* 448.) Such a service is expressly made applicable to summonses issued by justices of the peace. (*Code*, § 64, *sub.* 15.)

After the plaintiff presented her complaint to the justice,

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the defendant's attorney said he "appeared first preliminarily" for the purpose of objecting to the service of the process on James R. Morris, as he was not the president of the company. The defendant then called Stephen Estes, upon the point, who testified that Morris had parted with his stock in the company, and all of it, since he was elected president, and that there had been no president elected since January, 1855. The defendant then admitted the character in which the suit was brought to be correct, and put in an answer, in writing, to the complaint, and the cause was thereupon adjourned by consent of the parties, without any request being made by the defendant to the justice to dismiss the action by reason of the alleged irregular service of the summons upon Morris after he had ceased to be president of the company.

The defendant's counsel now insists that the judgment in the action should be reversed, for the alleged irregularity in the service of the summons upon Morris, after he had sold his stock in the company. I am of the opinion the defendant waived the alleged irregularity, by answering the complaint, without asking for a dismissal of the action, after the facts had been proved, which counsel now claims authorized the justice to dismiss it. (*Onderdonk v. Ranlett*, 3 *Hill*, 323.) If the defendant intended to persist in the objection to the regularity of the service of the summons, its attorney should have asked the justice to rule upon the question, after he had proved the facts upon which the objection was based, and before he put in the answer. The justice could not dismiss the action before such proof was made; and he was not obliged to do it afterwards, if the objection was well founded, for the reason that he was not called upon so to decide. He had the right to infer that the point was waived, as the defendant's attorney presented the answer to the complaint after the alleged irregularity was shown, and then consented to an adjournment of the cause to a future day, without requiring him to decide the question as to the regularity of the service

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of the summons. The proceedings of the justice, touching this point, were therefore regular, and should be upheld.

On the adjourned day, after the parties had appeared and answered, the defendant's attorney asked the justice to dismiss the action, on the ground that the process should have been served on each member of the corporation, instead of in the manner it was served ; also, on the ground that the justice had a brother who was a stockholder in the company that was the defendant in the action ; and the defendant's attorney offered to show that fact ; also, on the ground that the justice had not jurisdiction of the case. The justice overruled the objections, and refused to discontinue the action, and excluded the defendant's offer.

The first ground of this motion to dismiss the action had been previously waived, as has already been shown. The other ground will now be considered. The statute by which the question must be determined, is in these words, to wit : "No judge of any court can sit as such in any cause to which he is a party, or in which he is interested, or in which he would be excluded from being a juror, by reason of consanguinity or affinity to either of the parties." (2 R. S. 275, § 2.) It was held in *Edwards v. Russell*, (21 Wend. 63,) that this statute applies to justices of the peace. In *Foot v. Morgan*, (1 Hill, 654,) it was held that a justice of the peace could not give judgment in a cause, if he was related to *the party beneficially interested* in the subject matter of the action. But there is no case holding that a justice of the peace, or a judge, cannot sit as such in a cause to which a corporation is a party, if he be related to a stockholder in such corporation. A single stockholder is not *the party in interest* on the part of the corporation. His interest is limited and remote, and not full and immediate. The statute is not comprehensive enough to prevent the brother of a stockholder in a corporation sitting as a justice or judge in a cause to which such corporation is a party. The decision in the *Bank of Lansingburgh v. McKie*, (7 How. Pr. Rep. 360,) is to this

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effect. And inasmuch as there is no common law rule that disqualifies a justice of the peace or a judge from sitting as such in a cause, by reason of his relationship to a party or party in interest, the justice before whom this action was tried committed no error in giving judgment for the plaintiff, although he was a brother of a stockholder in the company that is the defendant; and he did right in rejecting the defendant's offer to show such fact.

It becomes unnecessary to examine the point made by the plaintiff's counsel, that the proof was properly rejected, on the ground that there was nothing in the answer of the defendant raising the question as to the jurisdiction of the justice.

The judgment of the county court should be affirmed.

Judgment of the county court and of the justice reversed, with costs.

[TIOGA GENERAL TERM, May 12, 1857. *Mason, Gray and Balcom, Justices.*]

 J. T. & C. W. BRIGGS vs. THE NEW YORK CENTRAL RAIL ROAD COMPANY.

A mere delay, in the delivery of goods, by a common carrier, is not a conversion of the property; nor will it entitle the owner to recover the value thereof. Where the defendant undertook to transport a quantity of garden seeds from Rochester to Rome, and there deliver the same to the Rome and Watertown Rail Road Company, to be conveyed to Sacket's Harbor, upon which delivery to the latter company the liability of the defendant should cease, and there was a delay of twelve days in so delivering the goods, but the same were delivered to that company before the commencement of the action: *it was held* that the delivery to the Rome and Watertown Rail Road Company was equivalent to a delivery to the plaintiffs, and that such delivery having been made before suit brought, no right of action existed, except for the unreasonable delay of the defendant in the transportation and delivery of the goods.

Held also, that in an action by the owners of the goods, against the carrier, the plaintiffs were not entitled to recover the value of the goods, but only for such trouble and expense as resulted directly and necessarily from the

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negligence and delay of the defendant in performing its undertaking, WELLES, J., dissented.

Held further, that the plaintiffs could not recover for the time and expenses of an agent and team, while waiting for the goods at Sacket's Harbor; without showing that the defendants had notice, at the time of contracting for the transportation of the goods, that an agent of the owners would be waiting at Sacket's Harbor, to receive them.

CROSS-APPEALS from a judgment entered at the circuit, upon a verdict. The action was commenced on the 20th day of December, 1853, and was brought to recover against the defendants, as common carriers, between Rochester and Rome, the value of 72 boxes of seeds shipped at Rochester for Sacket's Harbor, and to be delivered to the Rome and Watertown Rail Road Company at Rome; the defendants not to be responsible after the seeds should be delivered to the Rome and Watertown Rail Road Company. The cause was tried before SMITH, justice, at the Monroe circuit, in April, 1856.

It was admitted on the trial that the defendants, during the times hereinafter mentioned, were and still are a corporation and common carriers of property and freight by rail road cars propelled by steam, from the city of Rochester to Rome in the county of Oneida, in this state, and elsewhere, and that the plaintiffs, on the first day of December, 1853, were and ever since have been co-partners in the business of wholesale and retail dealers in garden and field seeds; and that their principal place of business was at Rochester. It was also admitted that on the 5th day of December, 1853, the plaintiffs delivered to the defendants, at their freight warehouse in the city of Rochester, 64 boxes of garden seeds and eight boxes of garden and field seeds, the property of the plaintiffs, marked "Samuel Phillips, Sacket's Harbor, N. Y." and that the defendants executed and delivered to the plaintiffs a receipt for the goods, in which the defendants agreed, for a reward paid to them by the plaintiffs, to forward the same according to their said mark, but not to be responsible after said goods should be delivered at Rome as aforesaid. It was also admitted that this action was commenced on the 20th day of December, 1853.

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It was then proved on the part of the plaintiffs, that on the 4th day of December, 1853, and from that time until the 20th of the same month, Samuel Phillips, who was their agent, engaged in the sale and distribution of garden seeds, was at Sacket's Harbor, waiting the arrival there of the 72 boxes of seeds above mentioned, for the purpose of distributing them about the country. That said seeds not having arrived on the 15th of December, he communicated with the plaintiffs at Rochester, by telegraph, on the subject, who, in consequence of the non-arrival of the first lot of seeds as directed, on the 16th of December delivered to the defendants at Rochester aforesaid a second lot of 71 boxes, similar to and directed as the first lot, and which reached Sacket's Harbor on the 19th of December, and were taken the next morning (20th December) by Phillips, who left Sacket's Harbor with them on that day, prior to the arrival there of the first lot. It was also proved that said Phillips, during all the time of his stay at Sacket's Harbor as aforesaid, had with him a span of horses and wagon belonging to the plaintiffs, used in the distribution of seeds, and that his wages and board, together with the cost of keeping the team and the value of its use, amounted in all to five dollars a day.

The evidence with regard to the value of the time of said Phillips and the team, and their expenses while at Sacket's Harbor, was objected to by the defendants' counsel before it was given, on the ground that those were not proper items of damage in this case, unless it were shown that the defendants were informed, when they received the goods, that there was, or was to be a person in waiting at Sacket's Harbor to receive them. The court overruled the objection, and the defendants' counsel excepted to such ruling. The 72 boxes of seeds were proved to be worth not less than \$300.

It was also proved that the seeds were in the warehouse of the defendants at Rochester at the time of the trial.

It was proved on the part of the defendants, that the 72 boxes of seeds reached Rome in a freight train going east from

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Rochester to Albany, in the night of the 6th day of December, 1853. That on their arrival at Rome it was raining very hard, and there being another freight train standing on the track between the running train and the freight warehouse, the boxes in question were transferred to such standing train, for the purpose of having them removed in the morning to the freight warehouse. In the morning their removal was neglected, and they were taken to Albany, from which place they were returned to Rome and arrived there on the 19th of December, 1853, and were on the same day shipped on board the freight train of the Rome and Watertown rail road, which train started for Watertown with said goods on the morning of the 20th December, and on the same day they were delivered at the rail road freight house in Sacket's Harbor. That the Rome and Watertown rail road connected at Watertown with another rail road extending from that place to Sacket's Harbor. It was also proved that the freight agent of the defendants at Rome received the freight bill sent from Rochester by the train which carried the seeds, on the morning of the 6th of December. That not finding the seeds in the warehouse, he laid the bill aside, and neglected to make any further inquiries for the seeds; that on the 10th or 12th of December, he sent an agent to Albany to look after lost freight; and that the agent found the seeds in question in the defendants' warehouse at Albany. The seeds were afterwards ordered back to Rome, where they arrived as before stated. It was also proved that the defendants' freight trains are usually about ten hours in going from Albany to Rome, and about eight hours in going from Rochester to Rome. Before the arrival of the goods at Sacket's Harbor, the said Phillips had left that place and did not return there.

On these facts the plaintiffs claimed to recover the value of the goods, the damages which they had sustained by the loss of time and expenses of Phillips and the team, and interest on the value of the goods during the delay.

The plaintiffs' counsel requested the court to charge the

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jury, that if they should find that the seeds in question were, by the gross negligence and carelessness of the defendants' agents, carried past Rome to Albany, and were detained as above mentioned, it was such a breach of duty on the part of the defendants as common carriers, as to render them liable for the whole value of the seeds. The court refused so to charge the jury, and the plaintiffs' counsel excepted.

The defendants' counsel requested the court to charge the jury, that the plaintiffs were not entitled to recover the value of the goods. The court did so instruct them, and the plaintiffs' counsel excepted. The defendants' counsel also requested the court to charge the jury, that the plaintiffs could not recover damages (if they had sustained any) by the unnecessary delay which had occurred in delivering the goods at Rome by the defendants, because such delay was not made a ground of action in the complaint, and the goods were delivered to the Rome and Watertown rail road before the commencement of this action. The court refused so to charge the jury, and the defendants' counsel excepted. The defendants' counsel also requested the court to charge the jury, that the plaintiffs could not recover for the loss of time and expenses of Phillips and the horses, as it did not appear that the defendants were notified of those special circumstances when they received the goods. The court refused so to instruct the jury, and on the contrary instructed them that the plaintiffs were entitled to recover for such loss of time and expenses; to which refusal and instructions the defendants' counsel excepted. The plaintiffs' counsel further requested the judge to charge the jury, that the conduct of the defendants' agents, as shown by the evidence, and the unreasonable delay in the delivery of the seeds at Rome, entitled the plaintiffs to refuse to receive the seeds, and that the defendants were liable to the plaintiffs for the value thereof. The court refused so to charge, and the plaintiffs' counsel excepted. The defendants' counsel requested the court to order a nonsuit, for the reasons above suggested; which the court refused to do, and the defendants' counsel

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excepted. The cause was then submitted to the jury, who found a verdict for the plaintiffs for \$65. Judgment was entered for that sum, with costs; from which both parties appealed.

S. Mathews, for the plaintiffs.

H. R. Selden, for the defendants.

JOHNSON, J. It appears from the case that the goods were delivered by the defendants to the Rome and Watertown Rail Road Company on the 19th of December, and this action was commenced on the following day. The rights of the parties must, of course, be determined by the state of things existing at the time the action was commenced. The plaintiffs then had a cause of action, but it was not for a destruction, or a conversion of the goods. It was for negligence in not delivering, in a reasonable time, to the Rome and Watertown Rail Road Company. The goods had then been delivered to that company by the defendants, and were on their way to the place of destination. The goods were not lost or destroyed; they were merely delayed, negligently. What then should be the measure of the recovery? Clearly the loss or damage the plaintiffs have sustained, by reason of the delay, and nothing more. This is not the value of the goods. They were still in existence, and were the goods of the plaintiffs. It is not shown that the goods had lost their value, or any value, by reason of the delay in transportation and delivery. The plaintiffs had been put to trouble and expense, in furnishing other similar goods, in order to prosecute their business; and for such trouble and expense as resulted directly and necessarily from the negligence and delay of the defendants in performing their undertaking, they are responsible in damages. Whether that shall be more or less than the value of the goods, depends upon the evidence. But the value of the goods is not the measure of damages, because the plaintiffs, for aught we know, and as

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we are bound to presume, until the contrary is shown, are still the owners of the goods. If the defendants have refused to deliver the goods since this action was commenced, and then been guilty of a conversion, that is a new and distinct cause of action, and has nothing to do with the measure of damages, here.

It seems to be settled law in this state, that a mere delay in delivery, by a carrier, is not a conversion of the property. So that the only claim for damages grows out of the delay.

A new trial should be granted, with costs to abide the event.

E. DARWIN SMITH, J. I concur in granting a new trial, on the question of damages, on the ground that the defendants had no notice, when they received the goods, that an agent would be in waiting to receive them at Sacket's Harbor; or that there was any special occasion or necessity for their prompt or immediate delivery. If any extra diligence was required or expected, of the defendants, in respect to the transmission or delivery of the seeds, they were entitled to notice of the special circumstances, before they could be liable for special damages. If the special circumstances had been communicated to, or been known by, the defendants, at the time of the receipt of the goods, then the damages resulting from a breach of the defendants' contract to deliver within a reasonable time might very properly be held to have been within the contemplation of the parties when the contract was made. (*Hawley v. Barendse*, 9 *Exch. Rep.* 341.) But I cannot concur in the opinion that the delay in the delivery of these seeds amounted to a conversion of them, or entitled the plaintiffs to recover the value thereof.

The seeds were received the 5th and arrived at Rome in the night of the 6th of December, and if they had been delivered the next day, December 7, to the Rome and Watertown Rail Road Company, there could be no pretense of negligence in respect to their delivery. They were actually delivered to the Rome and Watertown Rail Road Company on the 19th of the

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same month. This delay of twelve days was negligent, and entitled the plaintiffs to recover all the damages sustained thereby or by reason thereof, which were within the scope of damages naturally or reasonably consequent upon such delay—such as may reasonably be supposed within the contemplation of the parties—such as would ordinarily be incident to, or result from, such neglect, in the delivery of the property. But it did not amount to a conversion of the property; and, in my opinion, did not entitle the plaintiffs to recover the value of the goods. Mere delay in the delivery of property, by a carrier, is not a conversion, nor equivalent to a conversion. (6 *Hill*, 588. *Angell on Carriers*, § 431. *Scovill v. Griffith*, 2 *Kernan*, 518.) The defendants are common carriers, on the line of their road, but no further. When they had delivered these boxes, at Rome, to the Sacket's Harbor and Watertown Rail Road Company, their duty as common carriers was fulfilled. Such delivery was, in my opinion, equivalent to a delivery to the plaintiffs, who were bound to receive their property. (2 *Kernan*, 511. 22 *Barb.* 292.)

The delivery was made at Rome on the 19th of December, and this suit was commenced on the 20th of the same month, and when the property was on the way from Rome to Sacket's Harbor, in the possession of the Rome and Watertown Rail Road Company. No right of action, in my opinion, then existed, in behalf of the plaintiffs, in respect to such goods, except for the unreasonable and negligent delay of the defendants in their transportation and delivery. The defendants' duty had been fully discharged, except in respect to this simple question of negligence. For that, and that only, could the plaintiffs, at that time, maintain any action. The fact that, at the trial, these goods were in the possession of the defendants, I think, entirely immaterial. How such a fact came to be inserted in the case I cannot conceive. No such question was presented in the pleadings, or was at issue on the trial or proper to be presented there, in any way, except to contradict the defendants' evidence in respect to the delivery at Rome, or

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to satisfy the jury that the goods had never been sent forward from Rochester. This was not really pretended, and is in conflict with the conceded facts of the case.

WELLES, J. The property in question, consisting of 72 boxes of garden and field seeds, marked "Samuel Phillips, Sacket's Harbor, N. Y." was delivered by the plaintiffs to the defendants on the 5th day of December, 1853, at the freight warehouse of the latter in Rochester, and the defendants at the same time gave a receipt for it, in which they agreed to forward the same according to such mark, but not to be responsible after the goods should be delivered at Rome. The case shows that the defendants were common carriers from Rochester to Rome, and that there were rail road communications between Rome and Sacket's Harbor. By this agreement the defendants undertook, within a reasonable time, to carry the goods from Rochester to Rome, and there to ship them on board of a conveyance by which freight was usually conveyed from Rome to Sacket's Harbor. When they should do that, their obligation would be discharged.

The case further shows that on the evening of the 6th of December, the next day after the goods were received by the defendants, they reached Rome in a freight train going east from Rochester to Albany. At Rome the goods were transferred to another freight train of the defendants, standing on the track between the running train and the defendants' freight warehouse, for the purpose of having them removed in the morning to the warehouse. In the morning their removal was neglected, and they were taken to Albany, from which place they were returned to Rome on the 19th December, 1853, and were on the same day, at Rome, shipped on board the trains to Watertown. It also appears that on the 4th of December, 1853, and from that time to the 20th of the same month, Samuel Phillips, the plaintiffs' agent engaged in the sale and distribution of garden seeds, was at Sacket's Harbor, waiting the arrival there of the 72 boxes of seeds in question, for the

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purpose of distributing them about the country. That the said seeds not having arrived at Sacket's Harbor on the 15th December, Phillips communicated with the plaintiffs at Rochester, by telegraph, on the subject, and that the plaintiffs, in consequence of the non-arrival of the first lot of seeds as directed, on the 16th December, delivered to the defendants, at Rochester, 71 boxes similar to and directed as the first lot, which reached Sacket's Harbor on the 19th December, and were taken by Phillips, the next morning, (20th December,) who departed from Sacket's Harbor with them on that day, prior to the arrival there of the first lot.

These facts show gross negligence on the part of the defendants. The plaintiffs were bound to have an agent at Sacket's Harbor to receive the goods, a reasonable time after they were shipped at Rochester. This, the case shows, was done. Phillips was there for that purpose, waiting their arrival, from the 4th to the 20th of December, and when the goods arrived, he had left with other similar goods which the plaintiffs had shipped to him in consequence of the non-arrival of the goods in question. It does not appear that the goods were ever delivered, or offered to be delivered, by the defendants, to the plaintiffs or any agent of theirs, at any place, after the defendants received them, on the 5th of December; but on the contrary, that at the time of the trial they were in the defendants' warehouse at Rochester. When they arrived at Sacket's Harbor, if they ever were sent there, the plaintiffs had no agent there to receive them, nor were they bound to have one. They had kept one there a reasonable time, treated the goods as lost, and withdrawn him: all this in consequence of the inexcusable delay of the defendants in the delivery of the property at Rome. As the facts stand proved, as shown by the case, the plaintiffs clearly had the right to abandon the property in question and look to the defendants for its value. If they had returned the property to the plaintiffs, or offered to return it before the action was commenced, in as good

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condition as when received, they would not have been liable for its value. Their liability in that case would have been limited to the actual damages sustained by the plaintiffs by the negligence complained of. Probably the depreciation in their market value, together with such other actual damages as the plaintiffs may have sustained as the legal and direct consequences of the delay in the delivery, might have been recovered.

It is not necessary, in order to recover of a common carrier the value of goods delivered to him to be carried, that the facts should warrant an action such as would have been denominated an action of trover, before the names of actions were abolished; nor that the evidence should establish a conversion of the property by the carrier, to his own use. Suppose in this case the property had never been heard of at all after it was delivered to the defendants to be carried, &c. what, short of the value of the property, can be suggested as the measure of damages? The case as actually proved, is no better for the defendants than that supposed. The plaintiffs rightfully treated the property as lost, and brought their action. That it had all the time remained in the defendants' possession, not delivered or offered to be delivered, should not, in my opinion, go to diminish the plaintiffs' right of action, or their measure of damages. I desire to put this decision upon the particular circumstances of the case, and not upon the idea of a conversion by the defendants of the goods, which I do not think the evidence will warrant. The only question is the measure of the plaintiffs' damages; which, under the facts proved and admitted on the trial, can be nothing short, in my opinion, of the value of the goods. Under the proof in the case, I think the plaintiffs were not entitled to recover for the time and expenses of Phillips and the team, while waiting for the goods at Sacket's Harbor. To prepare the way for such an item of damages, the defendants should have notice, at the time of the contract to carry and forward the goods, that an

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agent would be placed there with a team and wagon to receive the seeds.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

New trial granted.

[MONROE GENERAL TERM, September 6, 1858. *Welles, Smith and Johnson, Justices.*]

WHITAKER & MOORE *vs.* MERRILL and others.

A legal proceeding, regular on its face, instituted by one party against another in violation of good faith, or contrary to his express agreement, and with a fraudulent intent, cannot be treated as a nullity, where the question arises collaterally. On the contrary, the courts are bound to treat it as a legal and valid proceeding, until it is set aside on a direct application for that purpose.

A debtor, for the purpose of effecting a compromise with his creditors, dispatched an agent to negotiate with them, entrusting him, for that purpose, with certain promissory notes made by a third person and then held by the debtor. The agent thereupon called upon the defendants, who were among the largest creditors, and they agreed to compromise their claim at twenty-five cents on the dollar, and signed a paper to that effect. They then proposed to have W., a person in their employ, take the notes and go to the other creditors, and get them, also, to sign the compromise. Having got possession of the notes in this manner, they refused to restore them; commenced a suit against their debtor, and obtained an attachment therein, by virtue of which the notes were seized by the sheriff, in the hands of W. The plaintiffs in that suit subsequently recovered a judgment, and by virtue of the attachment and judgment they claimed the right to retain the notes.

Held, in an action by the assignees of the debtor, to recover of the defendants for the conversion of the notes, that the attachment, and the seizure of the notes thereon, constituted a full and complete defense; and that the only remedy of the plaintiffs was by an action for the alleged fraud and breach of faith.

A verdict subject to the opinion of the court can be ordered only where the trial presents *questions of law*, alone.

In order to justify such a disposition of the case, at the circuit, the facts must all be agreed upon, or found by the jury, or established by *conclusive* evidence.

If there is no question of fact, in the case, such a verdict may be ordered,

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but if there be one, however strong the evidence may be, upon it, provided, from the nature of the case evidence would be admissible to rebut or overcome it, the question should be submitted to the jury to pass upon, with proper instructions from the court.

MOTION by the plaintiffs for judgment on a verdict taken, subject to the opinion of the supreme court. Also, motion by the defendants for judgment in their favor, on the case.

The action was brought for the conversion by the defendants of three negotiable promissory notes, amounting in the aggregate to \$2101.42 of principal, made by Daniel Tompkins, and payable to Clinton Evans or bearer, the assignor of the plaintiffs. The notes bore date July 17th, 1854; one being for \$814.63 and interest, payable nine months from date; one for \$814.63 and interest, payable twelve months from date; and the other for \$472.16 and interest, payable in eighteen months. The evidence on the trial, which took place at the Steuben circuit in May, 1857, tended to show that Evans, the payee of the notes, in July, 1854, was a resident of the village of Savona in the county of Steuben, and was the owner and holder of the three notes mentioned, made by said Daniel Tompkins. That Evans was indebted to one Franklin Converse of Troy, and to the plaintiffs and divers other persons of the city of New York. That in the latter part of said month of July, Converse called on Evans, at Savona, who placed the notes against Tompkins in his hands to go to New York and call on Evans' creditors there with a view of effecting a compromise with them of their demands against Evans. Converse was a witness on the trial, and testified among other things as follows: "I went to New York from Savona; called on Evans' creditors in New York. The first creditors I called on were the defendants Merrill, Townsend & Boynton; as they were one of the largest creditors, I called on them first, showed them the notes of Tompkins as the available means of Evans, and stated my object to be to get a compromise of his debts. I saw there Townsend and Boynton. They expressed themselves gratified, and said they were very

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glad of it; said they were ready to sign a compromise at twenty-five cents on a dollar. They proposed to draw up the paper of compromise and sign it. They drew up such a paper and signed it. I took the paper and went to other creditors; took with me the notes. After seeing some of the other creditors I came back to Merrill, Townsend & Boynton. They proposed to have Mr. Wright, a man in their employ, take the notes and go to the creditors and get them to sign. I agreed to it, and handed over the notes to Wright for that purpose in their store, in their presence and at their request. I went out, went to dinner, and after dinner returned to their store and inquired of them if Mr. Wright had returned from seeing the creditors. They said he had not. I called once or twice afterwards, and received the same answer, and began to suspect that things were not all right. I should say I went there half a dozen times to inquire after Wright. I asked each time I called, if the gentleman with the paper and the notes had returned yet, and each time they replied he had not. Finally they told me frankly that they had not intended he should see the creditors when the papers were placed in his hands, and that he had not been to see them. I then demanded the notes. They said they should hold them, and try and get their pay of Evans. I saw there was no use of staying any longer, and I left. They did not give up the notes."

There was nothing in the case to vary this evidence of Converse, but on the contrary it was fully corroborated by other evidence. On the 8th day of August, 1854, and after the transaction respecting the notes between the witness Converse and the defendants in the city of New York, as detailed by the witness, Evans made a general assignment of his property, including the notes in question, to the plaintiffs, in trust, for the payment of his debts. The plaintiffs further proved that after the assignment by Evans to them, they caused a demand to be made in their name, of the defendants, of the notes in question, and that the defendants refused to deliver them up. It appeared in evidence that on the 3d day of August, 1854,

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the defendants commenced an action by summons, against the said Clinton Evans and one W. W. Smith, which summons was personally served on Evans on the said 3d of August. That judgment was obtained in that action in favor of the said Merrill, Townsend & Boynton, against said Evans and Smith, on the 29th day of August, 1854, for \$832.96 damages, and \$16.25 costs. That on the same 3d day of August, Townsend, one of these defendants, made an affidavit in the action against Evans and Smith, and obtained an attachment from a justice of this court, against the property of Evans, dated the same day, directed to the sheriff of the city and county of New York, which was delivered to said sheriff, and by virtue of which the sheriff levied upon and seized the notes in question, in the hands of the said Wright, on the same day.

The justice, before whom this action was tried, directed a verdict in favor of the plaintiffs therein, against the defendants, for \$2520.66, subject to the opinion of the supreme court at general term.

There was other evidence given at the trial upon questions not now considered or decided.

William Irvine, for the plaintiffs.

George T. Spencer, for the defendants.

By the Court, WELLES, J. The view I take of this case renders it unnecessary to consider any of the questions presented and discussed upon the argument, excepting the effect of the attachment issued against the property of Clinton Evans, in the action commenced by the defendants against Evans and Smith, and the seizure of the notes thereon. The attachment was issued on the 3d day of August, 1854, and, as appears by the sheriff's return, the notes in question were levied upon by virtue of it the same day. The case does not show at what time the witness Converse demanded the notes of the defendants, whether before or after they were levied

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upon by the sheriff ; nor is it very important, in this case, whether it was before or after, as it is not denied that at the time of the levy they were the property of Evans.

They were subject to be attached by his creditors, as his property, notwithstanding the demand had been previously made. Assuming that there had been a conversion of the notes by the defendants, so as to render them *prima facie* liable to Evans, it did not transfer the title to them from Evans to the defendants. They still belonged to Evans, and could have been replevied by him from a person who had unlawfully taken or detained them. If the defendants had returned the notes to Evans or his assignees, or offered to return them to the person or persons entitled to them, no action could be sustained which should have been afterwards commenced, for a previous refusal to deliver them. In such action the plaintiff would not be entitled to recover even nominal damages, for the reason that the notes were not due, and consequently no legal damages would have been sustained.

The levy by the sheriff, by virtue of the attachment, was, in my opinion, equivalent, so far as the liability of the defendants in this action is concerned, to a return of the notes to Evans. Such would clearly be the effect, if the attaching creditors had not been these defendants, and they had not been guilty of fraudulently acquiring the possession of the notes, so as to enable the sheriff to take them by virtue of the attachment.

The question then is, are the defendants estopped from setting up the attachment and levy as a defense, by the deception practiced by them upon Converse, the agent of Evans, by which Converse was induced to deliver the notes to Wright, the clerk and agent of the defendants. There is nothing in the case impairing the legal validity of the attachment. If the notes had remained in the hands of Converse, they would have been liable to be taken by virtue of the attachment, and so, if they had been returned to Evans. It was the duty of the sheriff to take them, in whose hands soever he could find them.

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Unless, therefore, the attachment can be in some way effectually assailed, I am unable to perceive why it was not a full and complete defense to this action. Can it, in truth, be alleged that after the defendants had undertaken to negotiate the compromise with the creditors of Evans, they were not at liberty to commence their action, and obtain the attachment against his property, and that the proceedings were, in consequence of the bad faith of the defendants, utterly null and void? The question must either be answered in the affirmative, or the attachment and levy constitute a perfect defense. If the attachment was void, on account of the bad faith of the defendants, the commencement of the action in which it was issued, and the judgment rendered therein, were also void, for the same reason. The one was as really a breach of faith as the other. But no one will claim, I apprehend, that the judgment was void. We are not considering whether the court, on application by Evans, would have set aside the attachment. The question is, whether it can be attacked in this collateral way, and whether the court should now regard it as a nullity. In my opinion, we are not at liberty so to regard it; but, on the contrary, we are bound to treat it as a legal and valid proceeding, until set aside on a direct application for that purpose.

We have not been referred to any adjudged case, holding that a legal proceeding, regular on its face, instituted by a party against another, in violation of good faith, or contrary to his express agreement, and with a fraudulent intent, can be treated as a nullity, where the question arises collaterally, as in the present case. But there are cases strongly tending to uphold the contrary view, and to show that the remedy of the party aggrieved, if he have any, is by an action for the wrong complained of. *Putnam v. Man*, (3 Wend. 202,) was an action of trespass and false imprisonment, in arresting the plaintiff on an execution issued by a justice of the peace, in a suit in favor of the defendant against the plaintiff. In that case, Mann, the plaintiff before the justice, was a constable,

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and procured the summons against Putnam, and falsely and fraudulently returned it to the justice, as having been personally served on Putnam, when, in fact, it had not been served on him in any manner, and Putnam had no knowledge of its existence. On the return of the summons, judgment was rendered by the justice in favor of Mann against Putnam, and in the absence of the latter. Mann afterwards procured an execution on the judgment thus obtained, upon which Putnam was arrested, and detained in custody ; which was the imprisonment complained of. The plaintiff Putnam obtained a verdict at the circuit, subject to the opinion of the supreme court. The court, upon a case showing the above facts, gave judgment for the defendant ; holding that the judgment before the justice protected as well the party as the justice, and the officer who was instrumental in enforcing it. That the plaintiff Putnam could not traverse the truth of the return to the summons by plea in abatement or otherwise ; but that, if it was false, his remedy was by an action against the constable for a false return. That, as the justice had jurisdiction, and the proceedings were regular on their face, trespass would not lie.

The cases of *Allen v. Martin*, (10 *Wend.* 300,) and *Beaty v. Perkins*, (6 *id.* 382,) are to the same effect.

There should be a new trial for the error of the judge in directing a verdict for the plaintiff, with costs to abide the event.

The verdict, I am aware, was directed to be subject to the opinion of the court. But that could not be done in such a case as this. The only authority for ordering a verdict, subject to the opinion of the court, is section 265 of the code. By that section, where the trial presents *only questions of law*, the judge may direct a verdict, subject to the opinion of the court. This case is not one of that description.

In order to justify such a disposition of the case at the circuit, the facts should all be agreed upon, or found by the jury, or established by *conclusive* evidence. If there is *no*

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question of fact in the case, such a verdict may be ordered; but if there be one, however strong the evidence may be upon it, provided, from the nature of the case, evidence would be admissable to rebut or overcome it, the question should be submitted to the jury to pass upon, with proper instructions from the court. All we can do, therefore, in the present case, is to order a new trial.

[MONROE GENERAL TERM, September 6, 1858. Welles, Smith and Johnson, Justices.]

 HOPKINS vs. GRINNELL and others.

The defendants had recovered a judgment against a manufacturing corporation doing business in the state of New Jersey, the execution issued on which had been levied upon the personal property of the company, at the factory, and was the oldest lien thereon. The plaintiff, who was the managing agent and secretary of the company, with knowledge of these facts, entered into a contract with H., the president of the company, for the purchase of a part of the machinery in the factory for the price of \$1000, and gave his note for that sum, at four months. The defendants thereupon gave him an order, addressed to the sheriff, who had levied upon the property of the company, under their execution, as well as under others junior in date, directing him to deliver to the plaintiff the machinery which he had purchased; the plaintiff saying that such order was all he required, and that he could get the property upon it. The sheriff disregarded the order, and refused to deliver the property upon it, because of the lien of the junior executions. *Held* that, under the circumstances, there was no warranty of title; that the defendants had done all they agreed to do, in respect to a delivery of the property; and that no action would lie against them, for the non-delivery: the note given for the price not having been paid, and being produced for cancellation, on the trial.

Where it is apparent, from the whole case, that the plaintiff can in no event recover any thing but nominal damages, the court will not grant a new trial, although an error has been committed in the charge.

MOTION by the plaintiff for a new trial. The action was tried at a circuit court held in the county of Cayuga, in May, 1856, when there was a verdict in favor of the defend-

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ants. At the trial the following facts were disclosed : The defendants, the firm of Grinnell, Minturn & Company, were the selling and purchasing agents in the city of New York of the Somerville Rope and Bagging Company, a manufacturing corporation, carrying on its business at its works in Somerville in the state of New Jersey. The plaintiff was the managing agent of the same company, at the factory, and also the secretary of the company. On and before July 5, 1849, the affairs of the company had become embarrassed, judgments had been recovered against them, and their machinery and other property at Somerville were under levy upon executions. The defendants were the creditors and plaintiffs in one of the executions which was the oldest and had the prior lien upon the property of the company, and was much larger in amount than the sum of all the others, and more than the value of all the personal and other property of the company. These facts were, at the time, known to the plaintiff. On the said 5th day of July the plaintiff concluded a contract, at the defendants' counting room in New York, with John T. Hall, the president of the company, for the purchase of a part of the machinery in the company's factory, for the price of \$1000, fixed by the plaintiff (in his note at four months) as the true value of such machinery ; his representations both as to the quantity and specific character and condition of the machinery bought, and its value, being the only knowledge on the subject Mr. Hall had, and being relied on by him. On that day, (July 5,) the said Hall prepared a bill of sale of the machinery in question, which was subscribed by the defendants, and was in the words and figures following :

“ New York, July 5th, 1849.

John R. Hopkins, Esq. bought of Grinnell, Minturn & Co., agents R. & B. Co., one carding machine, one set preparing machine for flax, one spinning frame for thread with appurtenance, \$1000.

4 mos.

Rec'd your note at 4 mos.

(Signed) GRINNELL, MINTURN & Co.”

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At the same time Mr. Hall prepared a paper which was in the words and figures following:

“Sheriff of the county of Somerset, N. J. : Deliver to the order of John R. Hopkins, from the factory of the Rope and Bagging Company at Somerville, N. J., the following machinery, the property of said company, and now under levy upon an execution in our favor, and we will account to you for the same. [Here follows a specification of the machinery, as in the bill of sale.] Dated New York, July 5th, 1849.

(Signed) GRINNELL, MINTURN & Co.”

This paper was signed by the defendants. At the same time the plaintiff gave his note to the defendants, payable to them or their order, for \$1000, at four months. Moses H. Grinnell, one of the defendants, was a director in the said rope and bagging company. At the time of closing this contract for the sale of the machinery, it was known by the parties and Hall, that there were executions levied upon all the property of the rope and bagging company, and the fact was spoken of at the time. Hopkins said all he required was an order from the defendants on the sheriff of Somerset county, who held the executions, for the property, and he could get it. The plaintiff took the bill of sale and order on the sheriff, and having already the manual possession of the articles sold, as managing agent of the rope and bagging company, had them boxed, with his name and address, for transportation, and was about to remove them from the factory, when the sheriff's watchman prevented him. The sheriff refused to release the articles from the liens under the other executions, on the ground that he would become liable for their value. They remained under the liens, and were finally sold with the rest of the property of the company in the year 1851. The plaintiff never paid, or offered or was required to pay his note, and the same was produced by the defendants at the trial and offered to be canceled.

The action was brought for a failure to deliver the articles

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sold, and by the direction of the justice holding the circuit, the jury rendered a verdict for the defendants.

James R. Cox, for the plaintiff.

Wm. M. Evarts, for the defendants.

By the Court, WELLES, J. Assuming that in the sale of the machinery in question by the defendants to the plaintiff, the former acted in their own right and not as agents of the rope and bagging company, and that they made the sale without title, it appears abundantly by the evidence that the plaintiff, at the time he made the purchase, knew, as well as the defendants knew it, the condition of the title to the machinery. It was perfectly understood by all the parties, that the legal title was in the rope and bagging company, and that the property was largely encumbered by executions in the hands of the sheriff of Somerset county, New Jersey, by virtue of which a levy had been previously made. The property was not present at the sale, being in the factory at Somerville, and in the legal custody of the sheriff, and there was then no actual tangible delivery of the property to the plaintiff. One of the executions was in favor of the defendants, and was for an amount beyond the value of all the personal property levied upon. The other executions were comparatively small in amount, and were junior to that of the plaintiffs. Under these circumstances, all that the defendants could do towards giving possession was done, and the plaintiff met with no obstacles from the defendants or the company, in getting the possession, nor from any source, excepting the sheriff, who prevented his removing the machinery.

At the time of the sale, a part of the transaction agreed upon was, that the defendants should give the plaintiff an order on the sheriff for the machinery. This was all the plaintiff required. The order was given accordingly, but failed to accomplish the expectations of the parties. The sheriff disre-

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garded the order and detained the property. The defendants have done all they agreed to do in regard to giving possession. The order was, *quoad hoc*, a delivery of possession, so far as any delivery could then be made. It would probably have fulfilled the purpose for which it was given, except for the junior executions in favor of other creditors.

This contract of sale was made in the city of New York. The property in question was not in the possession of the defendants, at the time of the sale, and it does not appear that it ever had been in their possession. Under such a state of facts, as to which there is no controversy upon the evidence, the law does not imply a warranty of title.

There is no doubt of the general rule as held in this and other states, that where the seller has possession of the article and sells it as his own and not as agent for another, and for a fair price, he is understood to warrant the title. (2 *Kent's Com.* 478. *Parsons on Cont.* 556, 7, 8, and note h.) But if the seller is out of possession, and no affirmation of title is made, the purchaser buys at his peril. (*Same authorities.*) In this case the evidence entirely repels any implication of warranty.

If the jury, upon the evidence given at the trial, had found a verdict for the plaintiff, the court would have been bound to set it aside as against evidence; it was therefore proper for the judge to direct a verdict for the defendants, and a new trial should now be denied, for the same reason.

There is another reason why a new trial should be refused. It is apparent from the whole case, that the plaintiff can in no event recover any thing but nominal damages, and in such a case the court will not grant a new trial although an error has been committed in the charge. If here had been a warranty of title, and a full breach proved, the measure of damages would be the contract price paid for the property. (*Armstrong v. Percy*, 5 *Wend.* 535.) But the plaintiff has paid nothing, and his note, given for the machinery, was produced for cancellation on the trial. Under the facts disclosed no

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action could have been sustained upon the note. The entire failure of consideration would be a perfect defense to it. No error in admitting or rejecting evidence was committed on the trial.

New trial denied, and judgment ordered for the defendants, on the verdict.

[MONROE GENERAL TERM, September 6, 1858. *Welles, Smith and Johnson*, Justices.]

TIBBLES & MILLER *vs.* O'CONNOR.

Where, in an action claiming the delivery of personal property, a third person, on behalf of the plaintiff, executes an undertaking pursuant to, and in accordance with, section 209 of the code, conditioned for the payment to the defendants of such sum as may "*for any cause*" be recovered against the plaintiff; and the defendants subsequently obtain a judgment against the plaintiff for costs, and, upon appeal to the general term, such judgment is affirmed, with costs of the appeal; the two bills of costs are within the undertaking, and the obligor is liable therefor.

APPEAL from a judgment rendered at the circuit, upon a trial by the court without a jury. Martin Lynch sued Tibbles & Miller, claiming the delivery to him of a horse which was in their possession. To entitle Lynch to the immediate delivery of the property, the defendant, O'Connor, executed an undertaking pursuant to, and in accordance with, the provisions of section 209 of the code. The horse was then taken by the sheriff; and thereupon the above plaintiffs, Tibbles & Miller, gave an undertaking, under section 211 of the code, and the sheriff redelivered the horse to them. The action proceeded to trial and judgment; when the then defendants (the present plaintiffs) had judgment against Lynch, and that they recover of him \$62.64 costs. Lynch appealed to the general term of the supreme court, where the judgment was affirmed, with \$72.62 costs of the appeal. This action

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was brought upon the undertaking of O'Connor, given in the action brought by Lynch, above mentioned, to recover the two amounts of costs adjudged to them in that action. The plaintiffs recovered judgment at the circuit for the amount claimed by them, being the amounts of the two bills and interest. This was an appeal from that judgment.

S. Giles, for the defendant.

Geo. O. Rathbun, for the plaintiffs.

By the Court, WELLES, J. This is a clear case for the plaintiffs. The undertaking of the defendant provided, among other things, for the payment to the plaintiffs in this action of such sum as might *for any cause* be recovered against the plaintiff in that action. The 209th section of the code required that the undertaking should contain that provision. These plaintiffs have recovered these two sums in that action. They are clearly within the undertaking and the statute. It seems to me that there is no ground for the objections of the defendant.

The judgment must, therefore, be affirmed.

[MONROE GENERAL TERM, September 6, 1858. *Welles, Smith and Johnson*, Justices.]

ROGERS vs. THE MICHIGAN SOUTHERN AND NORTHERN INDIANA RAIL ROAD COMPANY and others.

Before a foreign corporation can rightfully be restrained by the supreme court of this state from issuing bonds, or from executing and delivering a mortgage upon its property, to secure the payment of such bonds, it must appear that the execution of such mortgage would be an injury or obstruction to rights of the plaintiff, which could be enforced in that court.

Where a party, having an attachment, judgment and execution against a foreign corporation, cannot reach property proposed to be mortgaged by such corporation, because it is beyond the jurisdiction of the court as a

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court of law, the supreme court will not interfere, by injunction, to prevent the execution of the mortgage; inasmuch as such mortgage, if executed, will not obstruct or prejudice the plaintiff's rights, as an attaching or judgment creditor, in this state.

If the plaintiff's judgment, execution and attachment are not liens on the property proposed to be mortgaged, he has no rights or preference, in respect to such property, over other creditors of the corporation, either as a judgment or an attaching creditor, or upon the ground of the alleged insolvency of the corporation.

And, even if the court had jurisdiction of the property, without such lien, it would be authorized to interfere, by injunction, only in an action by all the creditors, or for the benefit of all the creditors.

An injunction will not be granted to restrain a defendant from transferring, beyond the jurisdiction of this court, bonds, stocks, securities, and other equitable assets, where the plaintiff has a full and complete remedy at law, under a judgment, execution and attachment.

MOTION for an injunction.

John E. Burrill, for the plaintiff.

C. Tracy, for the defendants.

SUTHERLAND, J. The motion for an injunction in this case is denied, upon the following grounds :

First. As to the injunction specifically asked for in the complaint, restraining the company from issuing their second general mortgage bonds, and from executing and delivering any mortgage upon the property of said company, to secure the payment of such bonds, under or in pursuance of their printed proposal, a copy of which is annexed to said complaint. It appears that the mortgage intended by said proposal is upon the rail road property and franchises of the said corporation in the four states of Ohio, Michigan, Indiana and Illinois, and upon no other property whatsoever. It is unnecessary, therefore, in this case, to examine or pass upon the intent or effect of the execution of such mortgage as to the plaintiff or other creditors here. Before the defendants can rightfully be restrained by this court from issuing the bonds

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or executing the mortgage, it must appear that the execution of such mortgage would be an injury or obstruction to rights of the plaintiff, as a creditor, which could be enforced in this court.

The plaintiff has an attachment, judgment and execution ; yet at law he cannot reach the property proposed to be mortgaged, because it is beyond the jurisdiction of the court, as a court of law ; how then could the mortgage, however fraudulent, be an obstruction or injury to the rights of the plaintiff, as such judgment and execution creditor, to be prohibited by this court as a court of equity ?

As a court of equity, the court can only aid the plaintiff in enforcing his judgment, execution or attachment at law.

The mortgage, if executed, cannot obstruct or prejudice the plaintiff's rights, as an attaching or judgment creditor in this state ; and this court cannot therefore interfere by injunction.

Besides, as neither his judgment, execution or attachment is a lien on the property proposed to be mortgaged, the plaintiff has no rights or preference, as to that property, over other creditors of the company, either as a judgment or an attaching creditor ; or upon the ground of the alleged insolvency of the company. Had the court jurisdiction of the property, *without such lien*, it would be authorized to interfere by injunction only in an action by all the creditors, or for the benefit of all the creditors.

In actions for the specific performance of agreements, if the court has jurisdiction of the person, the remedy here is complete, although the property to be conveyed is out of the jurisdiction of the court, because the court, having jurisdiction of the person, can compel a conveyance ; and such conveyance, although executed in this state, may have the same force and effect as if executed in the state where the property is.

And, by means of a *ne exeat*, the court having jurisdiction of the person of a foreign debtor, might compel him to apply money, and perhaps other property, out of the jurisdiction of

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the court, to the payment of a debt due to a citizen of this state. But the plaintiff does not ask for the specific performance of a contract nor for a *ne exeat* ; and a *ne exeat* could not very well issue against a corporation, in any case.

Second. As to the injunction not specifically asked for in the complaint, but which is claimed under the prayer for other relief, restraining the defendants from transferring beyond the jurisdiction of this court certain bonds, stocks, securities, and other equitable assets, which are alleged to have been pledged by the defendants, and to have been redeemed, or about to be redeemed, for the purpose of so transferring them out of the jurisdiction of the court.

The plaintiff has full and complete remedy at law, under his judgment, execution, and the attachments which have been issued and which may be issued.

An attachment will stop their transfer as effectually as an injunction. As to the bonds, stocks, notes, and other equitable assets of the company, alleged to be covered up by the trust conveyance to the directors, Vermilye, Wells and Ransom, if Blake, the assignor of the plaintiff, under his attachments, acquired such an individual lien or preference as to authorize him, before the return of his execution, to commence an action, which it appears is still pending, to set aside such trust conveyance as a fraudulent obstruction to his attachments, then the plaintiff must go back to that suit, and add his allegations in this action as supplementary, and ask for an injunction, as an incident of his equitable right to remove such obstruction. By the complaint in this action, the plaintiff asks for no specific relief other than an injunction.

The complaint asks for no discovery of the fraud ; nor does it seek to set aside the trust conveyance to Vermilye, Wells and Ransom ; nor does it allege a return of the execution which had been issued on the judgment. It is neither a judgment creditor's bill, nor a bill to remove a fraudulent obstruction to the attachments or execution. I cannot find the equitable ground upon which the plaintiff asks merely for

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an injunction, or on which he can have an injunction without any other relief.

Third. Whatever equity there is in the complaint, arising from its allegations of insolvency or fraud, appears to be fully denied by the defendants.

Motion denied.

[NEW YORK SPECIAL TERM, February 20, 1858. *Sutherland*, Justice.]

MICHAEL P. MOORE *vs.* ALFRED S. LIVINGSTON and ELIZA B.
his wife.

In cases of the alleged loss of a deed, the law requires the greatest exactitude of proof. It requires incontrovertible evidence of the existence of the instrument; of its execution and delivery, by the subscribing witness; and if there is no subscribing witness, the most satisfactory proof of the genuineness of the grantor's signature.

If the handwriting of the alleged grantor is not sufficiently proved, the mere production of an instrument purporting to be signed by him, and proof of its subsequent loss, can be of no avail to the party claiming under it.

A complaint alleged that on or about Sept. 1, 1845, the defendant Mrs. L., then Miss B., in consideration of the sum of \$11,000, conveyed to the plaintiff certain lots of land in the city of New York, with the buildings thereon, and that the deed was duly acknowledged; that the deed remained in the plaintiff's possession more than eight months, when the defendant L. (who had in the meantime married Miss B.) asked permission to look at it; that the plaintiff handed it to him, under a promise that he would return it in a short time; that in October, 1851, L. set up the pretense that the property belonged to his wife; denying that he had ever received a deed from the plaintiff. The plaintiff demanded as relief that the defendants might be directed and decreed to deliver this deed to him, or, in case the same was lost or destroyed, that Mrs. L. might be decreed to execute and deliver a new conveyance of the premises, to the plaintiff. It appeared in evidence that the property in question had previously belonged to the plaintiff; that on the 11th of November, 1844, he conveyed it to D.; and that D. conveyed it to Miss B. June 11, 1845, for the consideration of one dollar, with covenants against his own acts. In order to establish the probability of the conveyance from Miss B. back to the plaintiff, and of which he now sought the redelivery, the plaintiff asserted that his conveyance to D. and D.'s conveyance to Miss B. were fictitious, and for the purpose of protecting the

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plaintiff's property from his creditors. There was no proof that the plaintiff exhibited any interest in the property, until his demand of a reconveyance from Miss B. in 1851, except his alleged statement to others that he had received a deed from her, in September, 1845. D. collected the rents for Miss B.; the lots were improved for her, by L., at a considerable expense; and they were mortgaged by Miss B. two years after the alleged reconveyance, and again five years after such reconveyance. In his examination before the surrogate, in 1844, the plaintiff swore that he sold the property to D. on the 10th or 12th of November in that year; that he had received \$10,650 for it, and that there was no understanding between him and D. as to the reconveyance of the premises; and in 1849 he stated to one B. that the sale was *bona fide*, and that Miss B. was the *bona fide* owner of the property. The deed which the plaintiff sought to have delivered up did not purport to have any subscribing witness, and the proof as to the handwriting of the alleged grantor was very slight. The commissioner before whom it was alleged to have been acknowledged had no recollection of the circumstance.

Held that in the face of these solemn and positive declarations of the plaintiff, it must be very strong and reliable evidence that would warrant the legal conclusion that he did not make a veritable sale to D., and that Miss B. was not the real owner. And that the allegation that Miss B. did, in consideration of \$11,000, convey the property in question to the plaintiff, was not entitled to the benefit of any presumption; but must be strictly and satisfactorily proved, according to the legal rules of evidence.

Held, also, that the testimony in the case was not of such force, and so satisfactory, as to justify the court in divesting a person of real property, of which she had been in possession for thirteen years; over which she had exercised independent acts of ownership, during that period; and of which the plaintiff himself, four years after the alleged execution of the conveyance from Miss B., declared that she was the *bona fide* owner.

Judgment rendered at a special term, in favor of the plaintiff, reversed, and a new trial ordered.

APPEAL, by the defendants, from a judgment rendered at a special term. The action was brought under the code of procedure, and was in the nature of a bill in equity. It was commenced April 25th, 1852, against the same defendants, the defendant Mrs. Livingston then being sole. The defendants having thereafter intermarried, an order was made October 24, 1855, directing that the action proceed against them as husband and wife. The defendant Alfred S. Livingston having demurred to the complaint, the demurrer was allowed, and judgment thereupon entered, dismissing the complaint as to him with costs, August 20, 1856. From this time forward

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he was not a party in his own right ; but only for conformity *qua* husband of the real defendant. The defendant Eliza, then Eliza B. Blackwell, put in an answer. On the issue thus joined, the action was tried by the court without a jury, at special term, March 16, 1857. The decision was in favor of the plaintiff, granting the whole relief claimed. The defendants having taken exceptions and made a case, appealed from the judgment to the general term.

The complaint alleged that on or about September 1, 1845, the defendant Mrs. Livingston, then Eliza B. Blackwell, "in consideration of the sum of \$11,000," conveyed to the plaintiff, Dr. M. P. Moore, one equal undivided moiety of two lots of land, one in Courtlandt street and the other in Broadway, in New York. That the deed was duly acknowledged before Dayton Hobart, a commissioner of deeds. That the consideration was "fully settled and adjusted between them previously to" the delivery of the deed. That the deed remained in the possession of Dr. Moore over eight months, "when he was requested by A. S. Livingston permission to look at the said deed," and handed him the deed, "and permitted him to take it with him under his promise to return it in a short time." That A. S. Livingston was then acting as Dr. Moore's agent in care of the premises ; that he so acted to the entire satisfaction of Dr. Moore, paying over all rents to him until October, 1851. That A. S. Livingston at this date denied that he had received the deed, refused to return it, and set up the pretense that the property belonged to Miss Blackwell. That the defendants were living together ; that A. S. Livingston insists that he is Miss Blackwell's agent in collecting the rents ; that Miss Blackwell, when requested to return the deed or execute a new one, declines any answer, but refers to A. S. Livingston. Prayer for a return of the deed, or the execution of a new one, and an account of the rents from July 1, 1851. The answer of Miss Blackwell admits that she claims to own the premises, and also that A. S. Livingston is her agent in collecting the rents thereof. Every thing else

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alleged in the complaint is denied. The judge at the trial suggested a doubt whether the answer unequivocally denied the execution of the alleged deed. The defendants' counsel at once moved for leave to amend the answer; but the plaintiff's counsel prevented that step by agreeing that "as a pleading the answer shall be regarded as fully putting in issue the allegations of the complaint as to the execution of any conveyance for all the purposes of this case." The property was described in the pleadings as having once belonged to Dr. Moore. The plaintiff gave in evidence a conveyance thereof, by Elias G. Drake to Miss Blackwell, dated June 11, 1845, for the consideration of one dollar, with covenants against his own acts. The defendants gave in evidence a full covenant warranty deed for the same premises, from Dr. Moore, the plaintiff, to said Elias G. Drake, dated November 11, 1844, in consideration of \$10,600. The defendants also gave in evidence the following documentary proofs touching the title and possession of the premises. 1. A mortgage for \$10,000, Stephen Price to Henry H. Watson, November 30, 1839. 2. Deed of D Ullman, master in chancery, on foreclosure of said mortgage, to Lewis Moore, dated May 18, 1841, recorded September 18, 1843; consideration, \$6000. 3. Lewis Moore and wife to M. P. Moore, the plaintiff; June 7, 1841; recorded June 21, 1841; consideration, \$11,148. 4. Lease by M. P. Moore and William Bradford, (owner of the other half,) for Courtlandt street property to William Burger, at \$540 per annum, three years from May 1, 1842, with extension for two years, dated Feb. 11, 1847, signed by the tenant, Bradford, the other owner, and Miss Blackwell. 5. A like lease of north half of the Broadway property to Kimball & Rogers, for five years from May 1, 1842, at \$800 per annum, with an extension for two years, dated Feb. 11, 1847, signed by Rogers, one of the tenants, and Miss Blackwell. 6. A like lease of south half of the Broadway property to J. G. Bolen for three years from May 1, 1842, at \$650 per annum, with an extension for two years, signed by the tenant and Elias G. Drake; and another exten-

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sion for two years at \$600 per annum, dated Feb. 11, 1847, signed by the tenant and Miss Blackwell. It appeared that Miss Blackwell was one of a family of that name consisting of one brother and five sisters; that A. S. Livingston, at the earliest period referred to in the proofs, was the husband of one of the sisters named Justina; that she died September 11, 1851, and that in 1854 he married her sister Eliza, the defendant. In 1840 or 1841 and onward to 1844, Justina Blackwell and her husband, A. S. Livingston, Harriet Blackwell and her husband Mr. Bleecker, Rosina Blackwell, Julia Blackwell and Eliza Blackwell, the defendant, all then unmarried, resided together as one family, in a house in Hubert street, New York. Afterwards A. S. Livingston, his wife Justina and the defendant Eliza boarded together for some time in Hudson street, New York. Afterwards they traveled together for a short time. After that period until Justina's death, the last named three persons lived together, first in Third street, New York, and then at Trenton, N. J. During all this period Dr. Moore was on very intimate and friendly terms with A. S. Livingston and the ladies. He boarded in the same house with them in Hudson street, and traveled with them, and was their family physician. At the time of the trial, only three of the sisters were living. Mrs. McDonald, one of them, was examined as a witness. Drake, the purchaser, collected the rents of the premises in question from August 1, 1845, (the first quarter after his purchase,) until August, 1847, first in his own name, afterwards as agent for Miss Blackwell. After that time A. S. Livingston collected the rents as agent for Miss Blackwell. No act of Dr. Moore was shown after the date of his deed to Drake, in connection with the property or indicating any care for or interest therein until his demand for a reconveyance in 1851 or 1852. In the years 1849-50 the two lots were improved upon at a cost of about \$14,000. Mr. Bradford, son and agent of the other co-owner, made the payments, receiving one half from A. S. Livingston. Miss Blackwell mortgaged the Courtlandt street property to C. Lawson for \$2000, Nov.

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23, 1847, and mortgaged the Broadway property to C. H. Marshall for \$5000, June 7, 1850.

The plaintiff produced *Thomas F. Conry, Thomas Seaman, Geo. L. Pride*, and his brother, *Charles Moore*, as witnesses to certain matters, tending, as he conceived, to the conclusion that such a deed as that alleged in the complaint had been in his possession about the year 1845. Except the delivery of a certain letter written by himself to Miss Blackwell, which was not answered, the contents of which were received under objection, he gave no evidence accounting for the non-production of the supposed deed. The oral testimony of each of said four witnesses, touching the existence and contents of the supposed deed not produced or accounted for, was objected to for that reason. The objection was in each instance overruled, and the decision excepted to. Mr. Dayton Hobart was also examined for the plaintiff; but he gave no material evidence. After all the plaintiff's *four* witnesses had been examined, and just before resting the case, Dr. Moore was himself offered as a witness "to prove the allegations in the complaint, about the manner in which the alleged deed to plaintiff was procured from him by A. S. Livingston, and to account for its loss," "not as a witness in chief, but to account for the non-production of the deed." The defendants objected to the reception of this evidence, on the ground that the inferior testimony had all been admitted without it, and because A. S. Livingston could not be heard to contradict the plaintiff as a witness for his wife, and the complaint showed that Mrs. Livingston had no personal knowledge of the fact in question, and consequently she could not avail herself of 2 *R. S.* 406, § 74. (*See Revisers' Note, 3 R. S.* 738, 2d ed.) The defendants, also, in support of their objection to this evidence, offered to waive expressly in writing any objection to other evidence founded on the non-production of the deed. The court, nevertheless, admitted the witness to testify, and the defendants excepted. Dr. Moore testified that he once had a paper *purporting*, &c., as alleged in complaint, and

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that he last saw it in the hands of A. S. Livingston, and did not at time of trial know where it was. Dr. Moore then offered himself as a witness in chief, with liberty to both defendants to become witnesses in contradiction to him. The offer was not accepted. The plaintiff then called the attention of the court to the fact, that the description in the complaint showed that Dr. Moore once owned the property, gave in evidence the deed from Drake to Miss Blackwell, and rested his case. Dayton Hobart testified that ten or twelve years prior to the trial, (say in 1845, 6 or 7,) he took the acknowledgment of Miss Blackwell to some instrument, at her residence in Hudson street, N. Y. He could recollect nothing more about the paper. He could recollect but one instance. He had a sort of vague impression that he might have taken her acknowledgment three or four times. The defendants produced a power of attorney from Miss Blackwell to S. C. Williams, witnessed by and acknowledged before this witness, December 7, 1844. John F. Conry, a witness for the plaintiff, testified that ten or twelve years before the trial, Dr. Moore called on witness to get a loan on real estate, and showed him a deed purporting to be signed and sealed by Eliza B. Blackwell; that Dr. Moore told him it was not recorded, and that he examined for and found upon it no indorsement of registry. It was not shown or pretended that this witness knew Miss Blackwell, or her handwriting; and each question to him, and each answer by him, was objected to by defendants. Each objection was overruled, and the defendants excepted. Thomas Seaman gave essentially the like testimony, fixing the time more exactly, September, 1845. He did not know Miss Blackwell or her handwriting. The plaintiff's conversations with him were allowed, under exception. Every part of his direct testimony was excepted to. His cross-examination tended very strongly to discredit his statement. George L. Pride gave the like testimony, with, *perhaps*, one additional fact. He testified that he remembered the name of Hobart to the acknowledgment. He said that

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he did not know his handwriting; took it for granted; he was not *then* acquainted with Mr. Hobart's handwriting to know it, to swear to it. He had not intimated that he had ever seen Mr. Hobart's writing, or knew him at all, or knew any thing of him; and the counsel for the plaintiff, in the face of an exception, was allowed to ask whether, from his "then knowledge of the character of Mr. Hobart's handwriting, he believed that to be his signature?" He answered affirmatively. He was cross-examined at length. He could not recollect how the name of Hobart was written, whether abbreviated or at length. He did not recollect reading the acknowledgment; he took it for granted. Did not scrutinize it. While under cross-examination he volunteered this statement: "I had seen Mr. Hobart write two or three times before that, when I had acknowledged deeds before him." This led to fuller cross-examination, when he declined to swear that he had so acknowledged any deed or paper before Mr. Hobart, or seen him write. He thought it was a deed of trust; looked at it but slightly; was rather attending to what Dr. Moore said, than looking at the deed. It was a hasty interview. He did not recollect the signer's christian name; nor whether or not Dr. Moore's signature was appended. Did not afterwards recur to this circumstance; and but for a recent conversation with Dr. Moore, would not have recollected the names as well as he did. The interview at which he saw the paper was at Dr. Moore's office, in Hudson street, about 11 o'clock in the morning. Dr. Moore called him in. At first he thought he could tell; but at last he failed in telling where he had been that morning, what his business had been, or whither he was going. He could give no fact, through which his story might be tested by contact with other witnesses. He had several real estate transactions during his life; he had bought and sold. He described the various instances; but he could not remember the name of any witness or commissioner to any of his deeds; had forgotten the names of some of his grantors, and had an imperfect recollec-

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tion of others. He had only seen Dr. Moore two or three times, and had only a bowing acquaintance with him; and never had but two conversations with him. One was when he saw the deed, the other was the year before. Could not tell who introduced them.

Charles Moore, a brother of plaintiff, testified that, about 11 A. M., one morning, in September, 1845, he had an interview with Dr. Moore in his bed room, *a back room in the second story of Mrs. Newport's boarding house in Hudson street.* That Dr. Moore then took from his coat pocket a deed conveying the premises in question to him, purporting to be signed by Miss Blackwell. That he had often been with his brother in that room. That he had no special occasion for calling on this occasion; the interview might have lasted two or three hours. This witness was about 19 years of age at the time referred to. He had been previously examined conditionally in the cause in 1852, and located this interview *in the parlor.* On the trial he was cross-examined to this point, and could not remember whether or not he had so testified; but he insisted, however that might be, that it in fact took place in the second story back room. Mrs. Newport, her sister-in-law, and her son were produced by the defendants, and united in testifying that Dr. Moore's bed room was a front room on the third story, and that while living in that house he never occupied any other room.

C. Moore said that there was no attesting witness. Mr. Hobart testified that it was his habit to see that there was an attesting witness, or to attest as such himself. He admitted that he did not scrutinize the signature; but said that he knew Miss Blackwell's handwriting, and that the signature to the deed was her's. He was fully cross-examined as to his knowledge of her handwriting. After stating that he saw her write a number of times, he retreated to *two occasions.* They were both about the same time in 1843, and no person present on either occasion was living at the time of the trial. The two occasions were as follows: He was in the habit of

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visiting at the residence of the Blackwell family in Hubert street, New York, for a couple of years ; had paid twelve to twenty visits. Once, without any known occasion, during one of witness' evening visits, Miss Blackwell took a pen, and wrote her name on a blank sheet two or three times. No one else was present. She said nothing ; did not ask witness to look at it. The other occasion was in the evening, when playing a game called *consequences*. She then wrote with a pen and ink. He had frequently played that game at that house ; but could name no living person with whom he had played it, except Miss Eliza B. Blackwell. Alex. N. Bleeker, who married Harriet Blackwell, one of the sisters, testified for the defendants that he understood the game called *consequences* ; that if a lady showed a gentleman what she wrote, it would spoil the game. In playing it, one could not see what others wrote. That a pencil is used ; pen and ink never ; it would be very inconvenient. That he never knew it played by Miss Blackwell, or in the Blackwell family. The only surviving sister who was able to attend, and the brother, testified that they never knew the game played in the family, or by the defendant Eliza. C. Moore, at first, named his employer at the time of this occurrence ; but afterwards said that he could not remember where he was then employed. He testified that A. S. Livingston superintended the rebuilding for Dr. Moore. He had been a witness for Dr. Moore in his various controversies, and was his expected devisee. He testified that one of the things written in this game of consequences was the name of Mr. Brantingham. Mr. Brantingham testified that he never visited at the house in Hubert street, and his acquaintance with Miss Blackwell commenced subsequently to her leaving that house. In 1852 he went to the house in Trenton, N. J., and there had an interview with Miss Blackwell, in the presence of A. S. Livingston. He told her he came, at Dr. Moore's request, with some papers, to induce her to convey the property back ; that he had a deed ready, and she had nothing to do but to

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sign it. She said he must speak to Alfred ; but he continued to speak to her ; Livingston became very angry, ordered him to withdraw ; and he did so, under an apprehension of being kicked out. He handed to, and left with her, a letter from Dr. Moore ; he showed her certain depositions to read ; she wept. He told her she knew very well why the property was put in her hands ; that she knew very well she had never paid any thing for it, and was bound to return it to Dr. Moore. She said she would do nothing in the matter. Nothing was said about the previous reconveyance, now alleged. It did not appear that Miss Blackwell opened, or read the letter. Under the defendants' exception, the court admitted it in evidence. It alleges, in substance, that Dr. Moore's conveyance was in trust for himself ; and that A. S. Livingston had destroyed a reconveyance executed by Miss Blackwell.

The plaintiff rested. The defendant gave the following evidence. *First.* The title papers before mentioned, other than the deed to Miss Blackwell, which the plaintiff had produced. *Secondly.* A complaint of Dr. Moore, in an action for medical services and money expended, brought against Miss Blackwell, April 22, 1852, claiming on oath \$3900. A like complaint, of same date, against A. S. Livingston, for \$14,760. *Thirdly.* An examination of Dr. Moore, the plaintiff, on oath, before the surrogate of New York, November 29, 1844, in which he expressly testified that the sale to Drake was without any understanding for a reconveyance, and was for the price or consideration of \$10,650 received by him. *Fourthly.* Elias G. Drake, the purchaser, testified that he bought from Dr. Moore at the request of A. S. Livingston, and paid him for the property with funds provided by A. S. Livingston. One item was Livingston's check for \$500. As far as he knew, it was an out and out *bona fide* sale. His intervention was procured to avoid suspicion that it was not an actual sale, Moore and Livingston being very intimate. At the request of Mrs. Justina Livingston, for whom he un-

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derstood the purchase to have been made, he executed the conveyance to Miss Blackwell. *Fifthly*. Thomas W. Brantingham testified that, in February or March, 1849, in a free and friendly conversation, Dr. Moore told him that his sale of the premises was *bona fide*, and that Miss Blackwell was *bona fide* owner of the property. In cross-examining the defendants' witnesses, the plaintiff sought to show that Miss Blackwell had not sufficient means to pay for the property when it was conveyed to Drake.

The defendants having rested, the plaintiff was allowed to give in evidence, by a bank clerk, a bank account of A. S. Livingston, as kept in 1844, in the Mechanics' Banking Association. The admission of this testimony was excepted to. The plaintiff then offered the examination and cross-examination of A. S. Livingston, as a witness, on the indictment of Dr. Moore, in February, 1857. The court admitted it, and the defendants excepted. The examination contained the most full and explicit declaration ; 1st, that the sale to Drake was *bona fide* and for full value. 2dly, that the full consideration was furnished to Drake by Livingston for the purpose, and, as the witness believed, paid over by Drake to Moore ; that Livingston never knew of, or had in his possession, any reconveyance to Moore.

The judge at special term found that the conveyance by Dr. Moore to Drake was made without consideration, with intent to hinder, delay and defraud Dr. Moore's creditors. Also that a reconveyance to Dr. Moore was executed by Miss Blackwell about Sept. 1845 ; and that such deed was in possession of A. S. Livingston ; that it was "mysteriously obtained" and "fraudulently withheld." And the court decided that the defendants should execute a deed to the plaintiff, and that the tenants should attorn. The defendants excepted. The defendants made a case containing the evidence, with their exceptions, in order to review the questions of law and fact.

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Mortimer Porter and *C. O'Connor*, for the appellants.

F. G. Young and *James T. Brady*, for the respondent.

By the Court, CLERKE, J. However singular may be the circumstances presented at the trial under consideration, the same measure and rules of evidence must be applied to it, as if it were an ordinary case. If a deviation from this course were permitted, because criminal or dishonorable conduct, on the part of any of the litigants, was disclosed in the controversy, we should be constantly constrained to disregard the principles which the law prescribes ; and, I apprehend, the rules would become exceptions, and exceptions the rules. For it is the sad result of judicial experience, that the majority of litigated actions originate in some transgression of moral duty, or some breach of sacred honor, calculated to enlist our sympathies, or to excite our detestation.

In the case before us the complaint alleges, that on or about 1st September, 1845, the defendant Mrs. Livingston, then Eliza B. Blackwell, in consideration of the sum of \$11,000, conveyed to the plaintiff one equal undivided moiety of two lots of land, with the buildings, &c. thereon, one in Courtlandt street, and the other in Broadway in this city, and that the deed was duly acknowledged before Dayton Hobart, a commissioner of deeds. • It further alleges, that the deed remained in the possession of the plaintiff more than eight months, when Alfred S. Livingston, one of the defendants, asked permission to look at it ; that the plaintiff handed it to him, under a promise that he would return it in a short time. It alleges that Livingston acted at this time as Moore's agent in the management of the premises, and that he continued to act in that capacity, collecting and paying over the rents to the plaintiff, and acting to his entire satisfaction until the month of October, 1851, when Livingston set up the pretense, that the property in question belonged to the said Eliza B. Blackwell, denying that he had ever received a deed from the plaintiff.

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The plaintiff demands as relief in this action, that the defendants and each of them may be directed and decreed to deliver this deed to him, and in case the same be lost or destroyed, that the defendant Eliza B. Blackwell may be decreed to execute and deliver a new conveyance of the said premises to the plaintiff.

Is there any measure of legal evidence presented in this case, upon which a court of justice can safely act, to prove that Eliza B. Blackwell executed, acknowledged and delivered to the plaintiff this deed of conveyance? It appears that the property in question had previously belonged to the plaintiff; that on the 11th of November, 1844, he conveyed it to Elias G. Drake; and that Drake conveyed it to Miss Blackwell, June 11, 1845, for the consideration of one dollar, with covenants against his own acts. But, in order to establish the probability of the conveyance from Miss Blackwell back to the plaintiff, and of which he now demands the redelivery, the plaintiff asserts that his conveyance to Drake, and Drake's conveyance to Miss Blackwell were fictitious, merely for the purpose of protecting the plaintiff's property from some possible impending legal assault.

It may be well, first to consider the evidence upon which this latter assertion is founded. Drake, to whom the plaintiff conveyed, testifies to the delivery of the conveyance to him, to his payment of \$500 on account, before he got the deed, to the delivery of the deed at the office of Archibald Rogers, the plaintiff's attorney, to the payment by him of the balance of the consideration money on the receipt of the instrument, in the presence of the plaintiff, and to his execution of a conveyance of the same property to Miss Blackwell, dated June 11, 1845, at the request of Mrs. Justina Livingston, the former wife of the defendant Alfred S. Livingston; for whom it is alleged by Livingston, it was purchased in trust by Drake. Drake testifies that it was given as the reason for his taking the title, that the plaintiff was in some legal difficulty; and from the great intimacy which existed between Dr. Moore and

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Livingston, it would look more like a real sale if he took the title. Livingston, he says, gave him the check for the \$500, and that afterwards, (after the payment of this sum on account, and before the delivery of the deed,) Livingston gave him the balance of the money, in checks and bills; whose checks he could not tell. Livingston handed him money and checks; "he could not tell how much in money; some of the checks he thought were Livingston's; did not know whose checks the rest were; could not tell the number of the checks." The amount paid by him, when he received the deed, was \$10,150; which, with the \$500 previously paid, made up the amount of the consideration money mentioned in the instrument. Drake further testified in answer to a question by defendants' counsel, asking him to state all that Mr. Livingston had said, when he first introduced the subject of his (Drake's) taking the title, that Livingston told him he was about to sail for Europe; he afterwards changed to the West Indies; "he said that some person had a property to sell, and he or some of his family, or his wife, or sister, wished to buy it; I don't remember which; and on account of his great intimacy with the owner, and of the owner being in difficulties, he did not wish to take the title in his own name." He further testified, that neither Moore nor Livingston, in any of the conversations, said any thing to the contrary of its being an absolute *bona fide* sale from Moore to the person for whom they were purchasing; that he had no knowledge or intimation that Moore was to have any interest in it after he conveyed to him; and that during all the time he was collecting rents, down to August, 1847, Moore never called on him to talk about the rent.

This is the only testimony in the whole case capable of throwing any light on the precise nature of the circumstances relative to the conveyance from Moore to Drake: and this testimony was introduced by the defendants. Strange to say, neither party called Rogers, Moore's attorney, or Williams, from whom Livingston declared he had received a portion of

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the consideration money. But as Livingston, in his testimony in the court of sessions, which the judge at special term thought proper to admit, asserted that the transaction was *bona fide*, that his sister-in-law had bought it from Moore at his (Livingston's) solicitation, and that he had obtained a part of the money with which to make the purchase from Mr. Williams, who was the agent of the Blackwell estate, and who had money in his hands belonging to that estate, it was assuredly very natural that the plaintiff should have procured his attendance as a witness; and as the burthen of proof rested on him, it is still stranger that he did not secure the testimony of his attorney, Mr. Rogers.

The only evidence in the case on this point, reaching beyond mere surmise or conjecture, having any tendency to corroborate the plaintiff's allegation, is the state of Livingston's account in the Mechanics' Banking Association at the time of the purchase, and the payment of a check on the Bank of New York, dated 12th November, 1846, for \$500, payable to Alfred S. Livingston or bearer, signed by the plaintiff. It undoubtedly appears from his account with the Mechanics' Bank aforesaid, that Livingston had not money in that particular place, at the time, to pay for this property. But he did not, at any time, pretend to derive it from this source; it is disclosed that there were other sources, from which it is not at all improbable he might have obtained the money. His wife and his sister were each entitled to from \$15,000 to \$20,000 out of the Blackwell estate, and it would not be at all extraordinary if Mr. Williams, the agent of that estate, advanced to Mr. Livingston some portion at least of the amount necessary to effect what he might have represented as a good purchase, and which subsequent circumstances proved to be a correct representation; and the very fact that the purchase was made, at least apparently, for Miss Blackwell, seems still more not only to show that the money was obtained from the Blackwell estate, but that the transaction was not of the character alleged by the plaintiff. For, if the conveyance was made for this purpose,

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it would have sufficiently answered that purpose to have it conveyed in trust to Drake for Livingston himself, instead of his wife, or his sister-in-law ; indeed, considering the circumstances and the unbounded confidence which the plaintiff declares he placed in Livingston at the time, it would have been safer to have the conveyance made to him than to his sister-in-law, who was a lady of some fortune, young, and therefore not likely to have the same control over it as a man, who was his own master, and who, Dr. Moore thought, was his devoted friend.

There is no proof that the plaintiff exhibited any interest in this property, until his demand from Miss Blackwell for a reconveyance, in 1851, except his alleged statement to his brother and others that he had received a deed from her in September, 1845. Drake collected the rents for Miss Blackwell ; the lots were improved at a considerable expense by Livingston for her ; they were twice mortgaged by Miss Blackwell, one mortgage being to secure \$2000, the other \$5000 ; one given in 1847, two years, the other in 1850, five years after the alleged reconveyance.

When we consider in addition to these circumstances, and the absolute failure of proof on the part of the plaintiff, in reference to the conveyance to Drake, his own sworn affidavit before the surrogate, and his admission to Brantingham, I can see nothing to justify the belief that the transaction was fictitious. In his examination before the surrogate on 29th Nov. 1844, he swears that he sold this property to Elias G. Drake, on the 10th or 12th of that present month ; that he had received \$10,650 for it, and that there was no understanding between him and Mr. Drake as to the reconveyance of the premises ; and to Brantingham he says, in February or March, 1849, that the sale was *bona fide*, and that Miss Blackwell was the *bona fide* owner of the property. It must be very strong and reliable evidence, indeed, that would warrant the legal conclusion that he did not make a veritable sale to Drake, and that Miss Blackwell was not the real owner, in the face of

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these solemn and positive declarations. But the evidence is not strong or reliable ; if there is any thing that deserves the name of evidence on that point, it is very weak and unreliable. No ground of probability is, therefore, left for the main allegation of the complaint, that Miss Blackwell did, on or about the 1st Sept. 1845, in consideration of the sum of \$11,000, convey to the plaintiff one equal undivided moiety of the property in question ; the proof of it must rest upon other circumstances, and other evidence, direct or indirect. This allegation is not, I maintain, as the case stands upon the point we have been considering, to have the benefit of any presumption ; the allegation must be strictly and satisfactorily proved, according to the legal rules of evidence.

In addition to the plaintiff's own evidence, which the defendant, now Mrs. Livingston, had no opportunity to refute by her own testimony, we have no evidence that amounts to any thing, not actually conjectural or very dim, except that of Charles Moore, the brother of the plaintiff.

Is his testimony of such force, and so satisfactory, as to justify the court to divest a person of real property of which she has been in possession for thirteen years ; over which she has exercised independent acts of ownership during that period ; and of which the plaintiff himself, four years after the alleged execution of the conveyance from Miss Blackwell, declared that she was the *bona fide* owner ?

The chief importance of the testimony of this witness depends upon what he says in relation to the handwriting of Miss Blackwell ; because if that handwriting is not sufficiently proved, the mere production by the plaintiff of an instrument, purporting to be signed by her, can be of no avail. If it can, no man's estate is secure for a day. It is only necessary for any one, determined to get possession of it, to prepare a deed purporting to be executed by the owner, to show it, at a convenient season, to any friend, and then to allege its loss. Fortunately, the law, in cases of alleged loss, requires the greatest exactitude of proof. It requires incontrovertible evi-

dence of the existence of the instrument ; of its execution and delivery, by the subscribing witness, and, if there is none, the most satisfactory proof of the genuineness of the grantor's signature. This witness is sure he saw Miss Blackwell write twice ; once when she was playing, with several others in the room, the game called consequences, in which " ladies and gentlemen all unite, and pass the same sheet from one to another ; they write a word, the name of a place or a person, and pass the paper round." What the *consequences* are, the witness does not inform us ; nor does he give us any explanation of the game. But he does not state that, on the occasion referred to, Miss Blackwell wrote her *name* ; if she wrote any other name, or any other word, while engaged in an evening pastime, it would be scarcely sufficient to afford the witness an adequate opportunity to become acquainted positively with her signature ; and it moreover appears, by the subsequent testimony of Mr. Bleeker, who was a member of the family at the time this game was performed at their house, that if a lady showed a gentleman what she wrote, it spoiled the game. On the only other occasion on which the witness states decidedly that he saw Miss Blackwell write, he says she wrote her name. She wrote her name two or three times ; " there was no special cause or occasion for it ; she wrote with pen and ink on paper ; it was left on the table." He does not distinctly recollect seeing her write at any other time ; though during his visits at this period he thinks he saw her write three times in all. Now certainly, without imputing any improper or intentional bias to the witness, it seems very clear that it would be unsafe, in the highest sense of that word, to consider this sufficient proof of the execution of an instrument of the most solemn and of the highest nature, known, with the exception of a record, to our law. But when we find that these visits occurred in December, 1843, and January, 1844, and that the alleged deed must have been shown to him by the plaintiff some time after the 1st of September, 1845, the date of its alleged execution, and that during this interval of nearly two

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years, the witness never saw Miss Blackwell write, our confidence in the sufficiency of his testimony for so serious a purpose, can scarcely be expected. We cannot also overlook the fact, that three or four of the persons who were members of the family at the time these visits occurred, testify that "they never knew the game played in the family, or by the defendant Eliza." Mr. Dayton Hobart, before whom the plaintiff says Miss Blackwell acknowledged the execution of this deed, has no recollection whatever of it; ten or twelve years prior to the trial, he took her acknowledgment to *some* instrument, at her residence in Hudson street. He could recollect distinctly only one instance; although he was personally acquainted with her very well; he may have taken others; he had a sort of vague recollection of having taken her acknowledgment three or four times. The defendants produced a power of attorney from Miss Blackwell to S. C. Williams, witnessed by and acknowledged before him. He states his uniform practice is to subscribe his name as a witness, where there is no other name subscribed as such. The alleged deed had, it is admitted, no witness. This certainly does not supply any deficiencies in the testimony of Charles Moore, who, as I have said, is the only witness brought to substantiate this grave and important claim, whose evidence is worthy of any consideration. Can we sustain the judgment of the special term on such evidence as this?

When, in addition to the intrinsic weakness of the plaintiff's proofs, we consider the circumstances accompanying the transactions connected with the disposition of this property, from the conveyance to Drake to the demand in 1851, we can no longer hesitate.

I have already referred to the plaintiff's sworn examination before the surrogate, and to his declaration to Brantingham, four years after the alleged execution of the deed, that Miss Blackwell was the *bona fide* owner of the property. But there are other acts and declarations, on his part, equally significant. He swears in his complaint that the defendant

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Eliza B. Blackwell, (now Mrs. Livingston,) conveyed this property to him in consideration of the sum of \$11,000; whereas the whole theory of his case rests on the assumption that she had held it in trust for him, and was, therefore, entitled to no price for it. In April, 1852, he commenced an action against Miss Blackwell for medical services, claiming on oath \$3900; and, for a similar cause, an action against Mr. Livingston, the other defendant, for \$14,760, likewise on oath.

It cannot fail to strike us as singular that the plaintiff never had this alleged deed recorded; for it is fairly to be presumed, if he sought and procured the reconveyance of this property in 1845, that the reasons which had induced him to make a fictitious disposal of it had ceased to exist; if they continued to exist, all his trouble, all the annoyances to which this proceeding exposed him, and the false, not to say dangerous, position in which it placed him, were all fruitless; and there is no suggestion whatever that he obtained this reconveyance in consequence of any waning confidence in the fidelity of Miss Blackwell or Mr. Livingston. On the contrary, his intimacy was undiminished, and he left the whole control of the property in their hands. But one of the most unaccountable of the plaintiff's inconsistencies is, that, although he handed this reconveyance back to Livingston, in June, 1846, at the request of the latter, who merely said he wanted to look at it; and that he then permitted him to take it with him, under his promise to return it *in a short time*, he allowed Livingston to retain it, without making any demand for it, until October, 1851; and consented also, notwithstanding this palpable and suspicious violation of his promise, that he should continue the manager of this property, receiving all its rents, and in 1849 and 1850 laying out large sums in its improvement; in fact, erecting new buildings conjointly with the other owner, Mr. Bradford, on both lots. And all this time, during this heavy expenditure, the plaintiff was never known to exhibit the least interest in the

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concern. Mr. Bradford had nothing to do with him ; he was not seen in the affair.

To say that the plaintiff, when he conveyed this property to Drake, never expected, at some future period, to receive it back, on repayment of the consideration money, or that the defendant Livingston never pledged himself to have it reconveyed, would be saying what may or not be true. The court has nothing to do with surmises or conjectures suggested by this "strange," and to the principal parties to this controversy, "eventful history." It is very manifest that there is most audacious and most dishonorable perfidy somewhere ; but our sphere of action, as a court of justice, is limited to proofs prescribed by law ; we could not, even if we had just, moral reasons, which we have not, for fixing the guilt upon the unworthy party, express any opinion, or institute any action upon it.

All that we are bound to say is, that the plaintiff has not legally proved his case ; that the decision of the special term is against the weight of evidence ; and that, therefore, its judgment should be reversed, with costs, and a new trial be ordered.

Having passed upon the whole case, independently of the evidence excepted to by the defendant's counsel, I have not thought it necessary to express any direct opinion upon the rulings of the judge in relation to that portion of the evidence.

[NEW YORK GENERAL TERM, November 4, 1858. *Davies, Clerke and Sutherland*, Justices.]

LYMAN, executor, &c. *vs.* PARSONS and others.

A testator, who was a resident of the state of Connecticut, and domiciled there, made his will in that state, and died there in October, 1848, leaving a widow and four children, one son and three daughters, all minors at the time of his death. A portion of his estate consisted of a leasehold interest in two

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houses and lots in the city of New York, stock in an insurance company, and promissory notes against persons and firms in the city of New York. By his will, the testator, after giving and devising to his wife his homestead, furniture, books, carriages, &c., and to his daughter C. a piano-forte, and an annuity of \$700 to his wife, gave and devised all the residue of his estate to his executors, *in trust*; two-fifth parts thereof for the sole use and benefit of his son, J. H., and *his heirs* and assigns forever; and the remaining three-fifth parts thereof for the sole use and benefit of his three daughters, in equal shares, to them respectively, and their respective heirs and assigns for ever. The testator then declared how, and in what manner, the trustees were to apply and dispose of the trust fund for the use and benefit of his children and their issue. During their minority, respectively, the trustees were directed to expend, for their support respectively, such sums as might seem expedient; charging the sums expended for each towards his or her share of the estate. The trustees were directed to pay his son, on his attaining the age of 21 years, \$5000, and a further sum, not exceeding \$5000, if they thought it would be for his interest. On his attaining the age of 23 years, they were directed to pay him such an amount as they should deem it most for his interest to receive, not exceeding \$10,000; on his attaining the age of 25, such sums as they should deem it most for his interest to receive, but not exceeding in any year \$10,000; and they were directed so to continue to make such payments, from one period of two years to another, until the share of the son should have been paid. The trustees were to pay to each of the daughters \$2000 on their respectively attaining the age of 21, and every two years thereafter \$2000, until the share of each should have been paid off; but the trustees, in their discretion, after the first payment to the daughters, were authorized to diminish the subsequent payments, provided they used no unnecessary delay in making the ultimate payment of the share of each daughter. If the son should die before receiving his share, leaving no lawful issue, then his share remaining in the hands of the trustees was to be paid over, in equal shares, to the daughters. And if any one or more of the daughters should die before receiving payment of their respective shares, leaving no lawful issue, their shares remaining unpaid were to be paid, two-fifths of each to the son, and the remainder to the surviving daughters. Should any one or more of the children die, leaving lawful issue, such issue should be entitled in equal portions to the share or shares of the respective parent or parents remaining in the hands of the trustees; but in such case the trustees were to hold and dispose of such share or shares in such manner that such issue only, and their legal representatives, should have benefit or advantage thereof. The executors were directed to sell the real estate in New York and Connecticut, and to add the proceeds thereof to the general fund. No direction was given as to the interest or income of the estate, as distinguished from the principal.

Held, 1. That the testator intended that the bulk of his estate, real as well as personal, should be converted into money, and invested and kept together

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by his trustees as one fund ; and that out of the same, and its accruing interest or income, the trustees should, from time to time, pay the annuity to the widow ; the sums deemed expedient for the support and education of the children during their minority ; and as they severally attained the age of 21, to each a certain other sum ; and after that, to pay over the residue of the fund or estate in their hands, with its accruing interest, to the children and *their issue*, in certain periodical payments ; and in a certain manner in their discretion.

2. That the testator did not intend that his children should have the interest or income of the fund, and the benefits and payments specifically directed by him, in addition ; but that he intended the interest or income of the fund to be added to the principal, and to be kept together ; and that out of this fund, increased by these additions of income or interest, the payments directed by him should from time to time be made.
3. That the whole trust estate was to be considered as converted into money, under the power of sale, and invested by his trustees living in Connecticut ; and the will was to be carried into effect, and the rights of parties beneficially interested under it were to be determined according to the laws of that state.
4. That the decree of the surrogate, declaring that the biennial payments directed in the will to be paid to the children of the testator, were applicable alone to the principal or corpus of the estate, and declaring that the children were entitled to, and that the executor should distribute, the net income of their shares from the time of the testator's decease, was erroneous, and should be reversed.
5. That the surrogate of New York had no jurisdiction over moneys voluntarily paid to the executor by New York debtors, previous to the granting of letters testamentary by said surrogate ; and that the decree of the surrogate, adjudging and decreeing that the executor should account to the surrogate for the assets realized by him from debtors residing in New York before the issuing of letters testamentary was erroneous.
6. That whether the trustees under the will had discretionary power to pay to the testator's son, J. H., out of the trust funds in their hands, at and after he should have attained the age of 25 years, \$20,000 biennially, until his entire share should be paid off, was a question for the courts of Connecticut, where the fund was. CLERKE, J., dissented.

APPEAL from a decree of the surrogate of New York, giving a construction to the will of Samuel Parsons, deceased, and directing the executor to account for the assets realized by him in this state. The facts appear in the opinion of SUTHERLAND, J., and in the report of the case before the

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surrogate. (4 *Bradf.* 268.) David Lyman, the executor, appealed.

Hiram Ketchum, for the appellant.

D. D. Field and *W. Stanley*, for the respondents.

SUTHERLAND, J. I think the construction of the will of Samuel Parsons by the supreme court of errors of Connecticut is the true construction, and that of the surrogate of the county of New York erroneous.

The testator, a resident of the state of Connecticut, and domiciled there, made his will in that state, and died there October 14, 1848, leaving a widow and four children, one son and three daughters, all minors at the time of his death; and an estate valued at about \$147,000, a portion of which consisted of a leasehold interest in two houses and lots in the city of New York, valued at about \$18,000; six shares of the stock of an insurance company in New York; and promissory notes against persons and firms in the city of New York, amounting to about \$34,000. The testator, by his will, dated the 7th day of October, 1848, after giving and devising to his wife his homestead, with the furniture, books, carriages, &c., and a piano-forte to his daughter Catharine, and an annuity of \$700 to his wife, to be paid to her by his executors out of his estate, until her decease or marriage; gives and devises all the residue of his estate to his executors, named in the will, (David Lyman, the appellant, and his wife,) *in trust*; two-fifth parts thereof for the sole use and benefit of his son Joseph H. Parsons, and *his heirs* and assigns for ever; and the remaining three-fifth parts for the sole use and benefit of his daughters, Catharine, Elizabeth and Caroline, in equal shares to them respectively, and their respective heirs and assigns for ever. The testator then declares *how* and *in what manner* the trustees are to apply and dispose of the trust fund for the *use and benefit* of his children and their issue.

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During their minority, respectively, the trustees are directed to expend for their support respectively such sums as may seem expedient, charging the sums expended for each toward his or her share of the estate. The trustees are directed to pay his son, on his attaining the age of 21 years, \$5000, and a further sum not exceeding \$5000, if they think it will be for his interest. On his attaining the age of 23 years, they are directed to pay him such an amount as they shall deem it most for his interest to receive, not exceeding \$10,000; on his attaining the age of 25, such sums as in their discretion they shall deem it most for his interest to receive, but not exceeding in any one year \$10,000; and they are directed so to continue to make such payments, from one period of two years to another, until the share of the son shall have been paid off and discharged. The trustees are to pay to each of the daughters \$2000, on their respectively attaining the age of 21; and every two years thereafter \$2000, until the share of each shall have been paid off; but the trustees, in the exercise of a sound discretion, after the first payment to the daughters, are authorized to diminish the subsequent payments, provided they use no unnecessary delay in making the ultimate payment of the share of each daughter. If the son dies before receiving his share, leaving no lawful issue, then his share remaining in the hands of the trustees is to be paid over in equal shares to his daughters. If any one or more of his daughters should die before receiving payment of their respective shares, leaving no lawful issue, their shares remaining unpaid shall be paid, two-fifths of each to the son, and the remainder to the surviving daughters. If any one or more of the children die, leaving lawful issue, such issue shall be entitled in equal portions to the share or shares of the respective parent or parents remaining in the hands of the trustees; but in such case the trustees are to hold and dispose of such share or shares in such manner that such issue only, and their legal representatives, and no other person or persons, shall have benefit or advantage thereof. The executors are directed to sell the real

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estate in New York and Connecticut, and to add the proceeds thereof to the general fund. The funds arising from the bills of exchange and promissory notes, as well as all other funds coming into their hands, are directed to be invested in safe interest paying national or state stocks, and some few banks of character and credit. No direction is given as to the interest or income of the estate as distinguished from the principal. These are the principal features and directions of the will.

It is very plain that the testator intended that the bulk of his estate, real as well as personal, should be converted into money, and invested and kept together by his trustees as one fund; and that out of the same, and its accruing interest or income, the trustees should from time to time pay the annuity to the widow; the sums deemed expedient for the support and education of the children during their minority; and as they severally attained the age of 21, to each a certain other sum; and after that to pay over the residue of the fund or estate in their hands, with its accruing income, to the children and *their issue* in certain periodical payments; and in a certain manner, with certain discretionary powers, given to the trustees; specified in the will with wonderful precision of language.

The direction, with regard to those payments for the support and education of the children during their minority, and to them and their issue on their attaining their majority, and afterwards so carefully given in the will, may be considered, and is a declaration by the testator of the manner in which he intended them to be benefited by his estate, and by his previous direct bequest and devise thereof to his executors in trust for their *use and benefit*.

The testator did not intend that his children should have the interest or income of the fund, and the benefits and payments specifically directed by him in addition; but he intended the interest or income of the fund to be added to the principal, and to be kept together, and that out of this fund,

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increased by these additions of income or interest, the payments directed by him to be made by his trustees should, from time to time, be made. It is very probable and reasonable that the interest, or sufficient to make the payment, would first be taken and used.

If there is any unlawful accumulation, or suspense of the absolute power of alienation, directed by the will, or involved in its provisions, it is for the courts in Connecticut to say so. The testator lived there; made his will there; died there; and this whole trust estate is to be considered as converted into money under the power of sale, and invested by his trustees living there. The will is to be carried into effect, and the rights of parties beneficially interested under it are to be determined according to the laws of that state. The testator violated no law of this state in making his will, and none need be violated in carrying it out.

It is very clear that the surrogate of New York was led to his construction of the will by too close attention to the particular clause of the gift and devise to the executors in trust for the use and benefit of the children, their heirs, &c., without paying sufficient attention to the subsequent provisions of the will, qualifying and explaining this use and benefit, and showing the testator's intention.

If the construction of the will was called for by the proceeding before the surrogate of New York, I think, therefore, his construction was erroneous, and that the parts of his decree founded thereon, declaring that the biennial payments directed in the will to be paid to the children of the testator, are applicable alone to the principal or corpus of the estate, and declaring that the children are entitled to, and that the executors distribute the net income of their shares from the time of the testator's decease, should be reversed.

The interest of the children in their unpaid shares can hardly be said to be vested; for, on the death of a child, his or her share remaining unpaid, would go to the surviving children.

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or to the issue of the child so dying, under the will, and not under the statute for the distribution of intestate's estates.

For reasons which will be very briefly stated, I also think that part of the decree of the surrogate of New York adjudging and decreeing that the appellant should account to said surrogate for the assets realized by him from persons and firms residing in the city of New York, and paid to the appellant before letters testamentary were granted by the said surrogate, was equally erroneous and should be reversed.

I suppose it would be correct to say that the title to all the personal property or movables of the testator, wherever situated, vests in his executor on his death, by virtue of the appointment in the will, rather than by the probate of the will and the granting of letters testamentary. (*Schultz v. Pulver*, 11 *Wend.* 363. *Valentine v. Jackson*, 9 *id.* 303. 1 *Wms. on Ex'rs*, 239.)

The probate and granting of letters testamentary is a municipal regulation for the purpose of furnishing authenticated evidence of the title of the executor and of his right to assert and enforce it. But one state cannot make a rule or regulation of evidence for the courts and authorities of another state; and therefore whether letters testamentary granted in Connecticut shall be evidence of the executor's title and rights in New York, depends upon the laws of New York. But as this question of evidence cannot arise except in some suit or legal proceeding by or against the executor for *enforcing* or *attempting to enforce* his right and title, I must confess I cannot see how it can arise in the case of a *voluntary payment* to a foreign executor, the party paying the money taking upon himself the risk of the title of the executor and of his right to receive payment. In this case, it appears that about \$34,000 of the estate of the testator consisted of promissory notes of persons and firms residing in the city of New York; that all of these notes were deposited by the executors in the Merchants' Bank of the City of New York, and in the Middlesex County Bank in Connecticut, and that they were all volunta-

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rily paid before October 27, 1849. Who can find fault with this voluntary payment without suit, fraud, or force? The parties who paid the money cannot and do not; for they have not been called upon for the money again; and it is not pretended that they have not paid it to the right person. The legatees, or those beneficially interested under the will, cannot, for the money has been paid to the right persons, and has gone to the right place—into the general fund of the estate in the hands of the trustees, to be distributed and paid out by them under the will of the testator; the construction of which, it is admitted, belongs to the courts in Connecticut; or at all events, is to be construed and carried into effect according to the laws of Connecticut. Who, then, can complain? And why should the surrogate of New York have assumed jurisdiction over the moneys thus voluntarily paid to the appellant by the New York debtors, and which had been added by him to the general fund of the estate in the hands of the trustees in Connecticut, and had been held by such trustees there, to be disposed of under the trusts of a will executed and which took effect there nearly six years ago, when letters testamentary were issued to the appellant by the surrogate of New York?

In my opinion it is clear; both on principle and authority, that the surrogate of New York had no jurisdiction whatever over the moneys thus voluntarily paid to the appellant by the New York debtors previous to the granting of letters testamentary by said surrogate. (*Vroom v. Van Horne*, 10 *Paige*, 556, 557, and authorities cited by the chancellor in that case. *Selectmen of Boston v. Boylston*, 2 *Mass. R.* 384.) It is true that it is perfectly well settled that the executors of Samuel Parsons could not have maintained a suit in this state by virtue of the letters testamentary granted in Connecticut. (*McNamara v. Dwyer*, 7 *Paige*, 243. *Schultz v. Pulver*, *supra*.) But it appears equally well settled that the will was to be interpreted, and the personal estate of the deceased was to be disposed of and distributed, according to the laws of the coun-

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try in which he had his domicil at the time of his death. (*Shultz v. Pulver, supra.* 4 *John. Ch.* 469.) The surrogate of New York admits in his opinion in this case that "this estate is to be distributed, and the will interpreted according to the laws of the domicil of the testator."

Whether the trustees under the will have discretionary power to pay to the testator's son, Joseph H. Parsons, out of the trust funds in their hands, at and after his having attained the age of 25 years, \$20,000 biennially until his entire share shall have been paid off, is a question, I think, for the court of Connecticut, where the fund is.

It is very clear, for reasons before stated, that the part of the surrogate's decree declaring that the trustees have this discretionary power to pay him \$20,000 biennially out of the principal of his share, as distinguished from the income, ordered to be paid over to the children by the appellant, is erroneous and should be reversed.

In my opinion, all those parts and portions of the decree of the surrogate appealed from by David Lyman should be reversed.

DAVIES, P. J., concurred.

CLERKE, J., (dissenting.) After a very minute examination of the facts and principles involved in this case, I entirely concur with the surrogate in the conclusions at which he has arrived on the two questions presented to him.

I. The executor having submitted himself to the jurisdiction of the surrogate of this county, must account to him in relation to *all* matters connected with his duties, and his accountability, as executor. The power of the officer is not partial or fragmentary; but, in order to be effectual, must embrace every thing necessary to the perfect administration of the estate. Whatever might have been the motive of the executor in applying for letters testamentary here, or whatever necessity might have impelled him to apply, the surrogate cannot inquire, as

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far as the *accounting* is concerned, whether he has accounted before any other jurisdiction, or not. I repeat, having come here, he is bound to account here, and that not in part, but in whole. He must account, and that necessarily means that he must render an entire statement of his receipts, payments and charges. Of course, he cannot be compelled to pay what he is bound to pay, more than once. But with regard to that matter, on this occasion, the surrogate and the court have nothing to do. The inquiry now concerns merely the accounting.

II. The surrogate, then, having the power to compel a complete accounting, he can determine the manner of the accounting, and the principles by which it is to be governed, only by the laws of our own state. If they are in conflict with the laws of any other jurisdiction, within which the property involved is placed, or before whom the executor might have previously accounted, it is not for the surrogate to apply the remedy.

In the beginning of the bequest, the whole estate is given absolutely for the sole use and benefit of his son and daughters, their heirs and assigns for ever. There is nothing inconsistent with this absolute gift in the subsequent clauses of the will. It is indeed, as to each legatee, liable to be divested, in case he should die before the payment of the share. But we know that the prior devise or bequest "must not be disturbed further than is absolutely necessary for the purpose of giving effect to the posterior qualifying disposition." It was very different in the case of *Chrystie v. Phylfe*, in which I maintained that the prior words of absolute inheritance were nullified by the posterior qualifying words. The subsequent limitations in that case provided that if Miss Mackaness should die unmarried without leaving lawful issue, the estate should go to her sisters, their heirs and assigns for ever. If she should die leaving lawful issue, then to such child or children, his, her or their heirs and assigns for ever; and in case she should die without lawful issue, and if at her death, her sisters should not be living, the will provided that the estate should go to

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the children of her said sisters, their heirs and assigns for ever. By no possibility, I therefore contended, by virtue of that devise, if the limitations were not to be totally rejected, could a fee vest in Miss Mackaness. These principles, which were indicated in a dissenting opinion, have been since fully recognized by the court of appeals, in *Norris v. Beyea*, (3 *Kernan*, 273.) In that case, there was a bequest in language denoting an absolute gift of the whole estate ; but, in a subsequent part of the same will there was a limitation over, in the event of the first legatee dying under age and without issue. The gifts, it was held, were not repugnant to each other ; but the latter was a valid executory gift. In these cases the intent of the testator, notwithstanding the apparent repugnancy, could be deduced from the whole scope of the will.

In the case before us, notwithstanding a similar apparent repugnancy, the intent of the testator can also be deduced from the whole scope and purport of the will ; but the intent is dissimilar from that deducible in the other cases. The portions treated of are invariably called the shares of the legatees, vested in and belonging to them, and to be paid to them, and to be given over only in case of death before payment. The payments are to be made, in some respect, according to the discretion of the executors ; but it was evidently intended by the testator, that the time of payment should not be arbitrarily protracted. They are cautioned not “ to use unnecessary delay in making ultimate payment ” of the share of each daughter. Now, although, as we have seen, the mere employment of the ordinary technical words of inheritance, does not peremptorily and positively import a fee, or absolute ownership, in defiance of subsequent words of qualification and limitation ; yet, if in addition to the words of inheritance, there is enough in the whole tenor and language of the will, to show that the testator intended that the whole property in the bequest should vest in the legatee, and not a mere life or usufructuary interest, then it is a safe rule, that the effect of the subsequent words shall be countervailed and the prior words

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effectuated. This I have endeavored to illustrate in the case to which I have above referred. And I think the present case affords an additional illustration of it. The testator directs full payment and discharge of the *corpus*, the principal, of the estate, not a payment or application merely of the proceeds or profits of it. This right to the *corpus* or principal, according to the respective shares, he plainly designed should at once vest in each child; liable, indeed, and barely liable, to be divested. But it would be a strange construction to liken such a bequest to a contingent or usufructuary interest. I, therefore, agree with the surrogate, that the children are entitled to all the produce of their shares from the time of the testator's decease, deducting what has been expended for their maintenance respectively; and that the biennial payments are applicable alone to the principal.

The surrogate's decree should be affirmed, with costs.

Decree reversed.

[NEW YORK GENERAL TERM, November 23, 1858. *Davies, Clerke and Sutherland, Justices.*]

HART, receiver of the Orleans Insurance Co. *vs.* ACHILLES.

A certificate, by examiners appointed by the comptroller, under section 11 of the act of April 10, 1849, relative to the incorporation of insurance companies, stating that they have made an examination, and found that a mutual insurance company "has received, and is in actual possession of capital, consisting of premium notes, to an amount at least equal to the amount required by said act, to wit, the sum of \$100,000;" and that from the best information they are able to obtain, they are "satisfied that the said notes are valid, for the purposes specified in the 5th section of said act," is substantially in conformity with the requirements of the 11th section of said act, and is sufficient.

And if the comptroller, after reciting the report of the examiners, certifies "that the said company is possessed of an amount of capital equal to the amount specified" in the 5th section of the statute, this, also, is sufficient in point of form.

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A promissory note, given to a mutual insurance company about to be formed, for the amount of an insurance to be consummated by the company upon its organization, by which the insured promises to pay to the company the sum specified, in such proportions and at such times as the directors of the company may, agreeably to the charter and by-laws, require; such note being made for the purpose of complying with the provisions of the act of April 10, 1849, relative to the incorporation of insurance companies, and of constituting a part of the capital stock; is payable absolutely, and can be collected by a receiver of the company upon its failure.

The act of April 10, 1849, does not authorize the formation of insurance companies upon the mutual, and the stock plans, combined.

Hence a company, organized under that act, cannot accept premium notes from a portion of its customers, and cash premiums from the remainder; and then assess the premium notes to pay losses occurring in either department.

MOTION for a new trial upon exceptions, ordered to be heard at a general term. The action was upon a premium note, in these words: "For value received, in policy No. 1875, dated Jan. 25th, 1851, issued by the Orleans Insurance Company, [I] promise to pay the said company, or their treasurer for the time being, the sum of three hundred and fifty dollars, in such proportions, and at such times, as the directors of said company may, agreeably to their charter and by-laws, require. (Signed) H. S. ACHILLES."

The questions discussed are sufficiently presented in the opinion.

Arad Thomas, for the plaintiff.

H. R. Selden, for the defendant.

By the Court, MARVIN, J. There was a motion for a non-suit, upon the ground that the Orleans Insurance Company had never been legally organized. The objection was, that the certificates annexed to the proposed charter were not in conformity with the requirements of the statute; and the counsel specified wherein they were defective. It should be stated that the Orleans Insurance Company was, by its arti-

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cles of association or charter, to conduct its business on "the plan of mutual insurance." The comptroller, as authorized by § 11, appointed three persons to make an examination, and these persons, after receiving their appointments, &c., certified "that we have this 5th day of June, 1850, made an examination, and found that said company have received, and are in actual possession of capital, consisting of premium notes, to an amount at least equal to the amount required by said act, to wit, the sum of \$100,000." The examiners add, "We further certify that, from the best information we are able to obtain, we are satisfied that the said notes are valid for the purposes specified in the 5th section of said act." The statute requires the examiners to certify, under oath, in the case of a *mutual company*, "that it has received, and is in actual possession of the capital, premiums, or engagements of insurance, as the case may be, to the full extent required by the 5th section of the act." (*Session Laws* 1849, 445, § 11.) The comptroller, after reciting the report of the examiners, certifies "that the said company is possessed of an amount of capital equal to the amount specified in the section aforesaid."

For the purpose of ascertaining whether the certificates of the examiners and comptroller were in accordance with the requirements of the act, it will be necessary to examine § 5, referred to; and, for the purpose of construing this section, it will be necessary to examine other portions of the statute. The 1st section of the act is very general, authorizing the formation of *insurance* companies, including insurance on health and life, and the power to grant, purchase or dispose of annuities. The 4th section authorizes the opening of books for subscription to the capital stock of the company intended to be organized, and to keep them open until the full amount specified in the charter is subscribed, or "in case the business of such company is proposed to be conducted on the plan of mutual insurance, then to open books to receive propositions, and enter into agreements, in the manner and to the extent hereinafter specified." Then follows the 5th section.

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It speaks of *joint stock* companies, to be organized in the city of New York and the county of Kings, requiring a capital of \$150,000 at least; and in any other county of the state a capital not less than \$50,000. It then speaks of companies formed on the plan of *mutual insurance*, located in the city of New York or county of Kings. They are not to commence business "until agreements have been entered into for insurance with at least 100 applicants, the premiums on which, if it be marine, shall amount to \$300,000, or if it be fire or inland navigation, shall amount to \$200,000, and notes have been received in advance for the premiums on such risks, payable at the end of, or within, twelve months from date thereof, which notes shall be considered a part of the capital stock, and shall be deemed valid, and shall be negotiable and collectable for the purpose of paying any losses which may accrue, or otherwise." Then comes the clause, "nor shall any mutual insurance company, in any other county in the state, commence business until agreements have been entered into for insurance, the premiums on which shall amount to \$100,000, and the notes received therefor, payable as aforesaid, and which notes shall be liable for and used as aforesaid."

Thus, it is seen, when these provisions are dissected and separated, that companies proposed to be conducted upon the plan of mutual insurance, were to be formed by opening books to receive *propositions*, and enter into agreements in the manner specified, viz: agreements for insurance, the premiums on which should amount to \$100,000, and notes to be received therefor. The character of these notes is declared. They are to be received in advance for premiums, and it is declared that they shall be considered a part of the capital stock. Turn now to the 11th section. The examiners are to "certify under oath, that an amount equal at least to the amount specified in the 5th section of this act, if it be a joint stock company, has been paid in, and is possessed by it in money, or in such stocks, and bonds and mortgages, as are required by the 8th section of this act; or if a *mutual company*, that it has

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received, and is in the actual possession of the capital, premiums, or engagements of insurance, as the case may be, to the full extent required by the 5th section of this act." What is meant by the words "capital, premiums, or engagements of insurance," followed by the words "as the case may be," and then by a reference to the 5th section of the act? We have seen that there was but one mode of forming these companies, and that was by agreements entered into for insurance, the premiums on which should amount to \$100,000; and that notes should be taken therefor, in advance, for the premiums. What is meant by "premiums?" The 5th section does not require the payment of premiums, or authorize the receipt of any premiums. Notes in advance for the premiums were to be given. If the language were "capital and engagements," and rejecting the words "as the case may be," there would be no difficulty, as by the 5th section it is declared that the notes shall be considered a part of the capital stock; or if the term "capital," only had been used, we should have no difficulty, as it would mean the notes described in the 5th section. The language used in the certificate is, "that the company has received, and is in actual possession of capital, consisting of premium notes, to an amount at least equal to the amount required by said act, to wit, one hundred thousand dollars."

I am inclined to think the certificate sufficient. It is a certificate that the company had the amount of capital, to wit, \$100,000, required by the statute, and that it consisted of premium notes. In the statute they are not called premium notes, but notes in advance for the premiums. There was no great impropriety in calling them *premium* notes.

The defendant offered to prove that the company, at the time of its organization, had no notes, except such as were in the form and terms of the one in suit; that is, that they were payable "in such proportions, and at such time or times, as the directors of said company may, agreeably to their charter and by-laws, require." The evidence was excluded, and the

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defendant excepted. It is insisted that such notes were not authorized by the statute in forming the company, and if so, that no company has been formed. I think that *White, receiver &c. v. Haight*, (16 N. Y. R. 310,) answers this objection. In that case, the note was given in the course of the formation of the company, and was, in form, substantially like the note in the present case; and it was held by the court of appeals that the note, being made for the purpose of complying with the provisions of the act, and of constituting a part of the capital stock, was payable absolutely, and that it might be indorsed and transferred by the corporation; and that it could be collected. This case is in point. The supreme court had not the benefit of this case, when *Williams, receiver &c. v. Babcock*, (25 Barb. 109,) was decided.

It appeared, from the evidence, that the assessment was made upon notes amounting to \$112,000. The aggregate of assessments was near \$77,000. The assessment upon the defendant's note was \$249.25. A large portion of the losses were upon policies issued for *cash premiums*; the assured, or policy holders, having given no notes. The witness stated that he thought two-thirds in amount of the losses for which assessments were made were of this class, and that no corresponding assessments were made against the claimants. He specified a large number of such persons, and the amounts of losses. Thus it is seen that this company conducted its business upon the mutual insurance plan, by taking premium notes from the assured, who thus became members of the company, and also upon the cash plan, that is, receiving from the assured a cash premium without any notes. The result being, that in case of losses in both cases, a resort might be had to the notes alone for the payment of such losses. Had the company authority to proceed in this way?

It is declared, in the articles of association or charter, that the business of the company shall be conducted on the plan of mutual insurance. It is then added: "It shall possess all the powers conferred by said act, and which now or here-

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after may be conferred by law, upon an incorporated company formed under said act for the purpose aforesaid, but whose business is to be conducted on the plan aforesaid." It is in another section declared, that the company shall regulate and determine the rates of insurance, and the amount, by premium notes or cash, to be received from the insured, &c. Again: "It shall be lawful for any person applying for insurance, if he shall so elect, to pay such definite sum in money, as the company may determine, in full for said insurance, and in lieu of a premium note."

The capital was to be not less than \$100,000, to consist of premiums received, premium notes, and such cash capital as by consent of the board of directors may have been added. It is also provided that the board of directors may, pursuant to the provisions of the act, unite a cash capital, as an additional security to the members, over and above their premium and stock notes, and prescribe the mode and manner in which said cash capital shall be subscribed and united as aforesaid. Here is a sufficient reference to the charter for our present purpose, and its provisions are, probably, sufficient to justify the practice under it. The question then is, did the statute of 1849 authorize such a charter? In my opinion it did not. The statute is extremely obscure, faulty and imperfect, and great difficulties have arisen in construing it. An attempt was made in this act, and such was its design, to provide for the organization of insurance companies upon different principles and plans from what was previously practiced. But it was never the design that one company should possess the powers combined, of each and all the companies authorized by the act; and, in so understanding the act, a fatal error has been committed. Indeed, if proper reflection had been bestowed upon the subject by those engaged in forming companies under the act, they must, or ought to have seen that the system, provided for in the act, could not be practicably united. The statute is entitled "an act to provide for the incorporation of insurance companies." The 1st section

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is general. The 2d section relates to reinsurance. The 3d section relates to the mode of organizing and the evidence of it. The 4th section authorizes individuals, associated for the purpose of organizing any company under the act, after publishing a notice, &c., "to open books for subscription to the capital stock of the company so intended to be organized, and to keep the same open until the full amount specified in the statute is subscribed; or, in case the business of such company is proposed to be conducted on the plan of mutual insurance, then to open books to receive propositions, and enter into agreements in the manner and to the extent hereinafter specified." Here is a provision relating to joint stock companies to be formed with a certain amount of capital, and which company, when organized, is to insure third persons, who, in no sense, are to be members of the company; and also another provision, relating exclusively to companies proposing to conduct their business on the plan of mutual insurance. These companies are to be different and distinct things, acting upon different principles, and governed by different rules, and the two cannot, in practice, be united. At any rate the legislature has authorized no union.

The 5th section requires a certain amount of capital, in case the company is a "joint stock company." It then contains provisions relating to companies formed for the purpose of doing business "on the plan of mutual insurance." By reading this section carefully, it will be seen that it provides that no mutual insurance company, in any county other than New York and Kings, shall commence business until agreements have been entered into for insurance, the premiums on which shall amount to \$100,000; and the notes received therefor, payable as aforesaid, (that is, "at the end of, or within twelve months from, date thereof,") and which notes shall be liable for and used as aforesaid, (that is, "shall be considered a part of the capital stock, and shall be deemed valid, and shall be negotiable and collectable for the purpose of paying any losses which

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may accrue, or otherwise.") These provisions relate to companies to be formed on the plan of mutual insurance.

It is not necessary, in this case, to enter upon an extended explanation of these provisions. I had occasion some years since, at special term, to consider them, and I came to the conclusion that it was necessary that agreements should be entered into for insurance, and that notes should be given for the premiums amounting in the aggregate to \$100,000. I thought that there should be a "proposition" to become insured upon a specific house, ship, or other insurable property, and that an agreement should be made, and a note for the premium given, so that when the company was organized and commenced doing business, it could, and would, at once issue the policy to the individual who had entered into the agreement for insurance, and had given his premium note.

As I understand Denio, Ch. J., in *White v. Haight*, (16 *N. Y. R.* 310,) he does not appear to regard the entering into an agreement for any specific insurance, at the time the note is given, as material. He regards them as notes payable absolutely, constituting the capital upon which the company is authorized to commence business, and entitling each maker of a note to policies of insurance, the premiums on which will amount to the amount of the note, and that the note is to be paid at all events. This construction of the statute, as to the notes, is very important, and I have no doubt correct; and yet I apprehend that but very few persons who have given their notes *to aid* in the formation of these companies, supposed at the time that such was their liability. In the opinion, to which reference is here made, the learned chief justice has given a history of the legislation of the state, relating to mutual insurance companies, prior to the act of 1849; and although the question involved and decided in that case was very different from the question we are now considering, the opinion is of great service in elucidating the question. In the present case construction must be given to the

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words, "plan of mutual insurance," and "mutual insurance company."

The statute does not prescribe the mode and manner of doing business after the company is incorporated, but it declares that it shall be the duty of the incorporators of any and every company, organized under the act, to declare in the charter the mode and manner in which the corporate powers, given under and by virtue of the act, are to be exercised. (§ 10.) It does not follow from this, that a company organized to do business on the "plan of mutual insurance" can also, by so providing in its charter, do business as a joint stock company. In other words, such company cannot, by so providing in its charter, do any and all kinds of insurance, in any and all the modes and manner contemplated by the statute for the different companies. The incorporators are to declare in the charter the mode and manner in which the corporate powers given under and by virtue of the act are to be exercised; that is, if a mutual company, the mode and manner of exercising the powers applicable to such companies. If a joint stock company, then the mode and manner of exercising the powers applicable and proper for such companies. And for the purpose of ascertaining what powers are applicable to mutual insurance companies, and the mode and manner of exercising the powers, it is important to know what a *mutual insurance company* is. Judge Denio, in *White v. Haight*, (*supra*,) after giving a history of the legislation down to 1849, says, that mutual insurance consists in the association of individuals for the purpose of insuring each other. The association was not to have any dealings in regard to insurance, except with its own members. Each one of these members was to be insured, and to be indemnified, in the case of a loss, at the expense of all the other members. The very term "mutual insurance company" implies all this. All the members of the company mutually insure each other. The mode and manner of accomplishing this may be, and has been, different. The mode prescribed in the early charters in this state

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was, that the person insured should deposit his promissory note for such a sum of money as should be determined by the directors, and a part of the note, exceeding five per cent, was to be immediately paid. Such person became a member of the company, and was bound to pay for losses in proportion to the amount of his promissory note. (*See Charter of Jefferson Co. Mut. Ins. Co., Sess. L. 1836, p. 43, §§ 6, 8.*) Some years later a different system was adopted in some of the charters—generally in the cities—by which the note of the assured was dispensed with, and the cash premiums only were paid. In some of the charters the plan of receiving notes for premiums in advance, of persons intending to receive policies, was adopted, for the security of the dealers with the company. In some of the charters authority is given to the company to receive from any person or persons money, in the aggregate not exceeding a certain amount, and to issue certificates therefor, and allow interest and profits, if any. This money, so received, was liable for losses. The persons advancing it, however, did not become insured. I have looked pretty generally through the legislation from 1836. I shall not here refer to the various statutes I have consulted. They, and others, will be found in the session laws. My object in consulting them has been to ascertain whether any company, organized on the plan of mutual insurance, has been authorized to enter into the contract of insurance with a third person who did not become, and was not to become, a member of the company. I have found no such instance, and I apprehend none can be found. All who become insured in a mutual company become members, and are bound to contribute for all losses, in one form or another. It will be found, also, in all the schemes, that there is a complete *mutuality*. In those cases where no notes were to be given, it was supposed that the premiums would be sufficient to pay losses, and careful provisions were inserted relating to the premiums and their investments. When money was received from third persons it was placed in hazard for losses, in consideration of the

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agreement to pay interest, and also profits, if any should be made. But it will be found, on consulting the statutes and the different systems, complicated as some of them are, that there was a complete *mutuality* between all those who were insured and became members.

I have no doubt a mutual insurance company may be organized, under the act of 1849, upon any plan of *mutual insurance* previously adopted, or probably upon any plan not prohibited by law, which should be *mutual*, and by which each should be insured by all the others, and all the others by him. But the plan must be such as to be practical and capable of execution. It should not contain provisions inconsistent and in conflict with each other, and which cannot be carried into effect. For instance, I do not see how a mutual company can take a premium note from one of its members, and a small portion of the note in money, and from another a large sum of money and no note. Any one can see that this cannot be mutual. The risks, or rather the liability of the insured, are not the same.

He who has given his note may be called upon to pay it in full. If so, he must pay a much larger sum than he who paid all cash for his policy. If not called upon to pay any of the note, then he will be in a better condition than the man who paid a larger cash premium without any note. There is no mutuality in this mode of doing business; assuming that he who paid cash only for his policy is a member of the company. If he is a member of the company, he should be assessed to pay losses; and how can this be done justly, he having paid a much larger sum in cash for his policy than those who gave notes?

I suppose, however, that the cash policy-man is not regarded as a member of the company. The charter in the present case is extremely meagre. It declares, what was quite unnecessary, that it (the company) shall possess all the powers conferred by the act. It would have had all the powers which the act conferred in a case where the business was to be

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conducted on the plan of mutual insurance, if it had been silent. What the statute requires is that the *mode* and *manner* of exercising the powers given should be declared in the charter. It is declared in the charter, after speaking of premium notes, &c., that "it shall be lawful for any person applying for insurance, if he shall so elect, to pay such definite sum in money as the company may determine, in full for said insurance, and in lieu of a premium note." This provision and mode of doing business, in connection with the mutual insurance plan, with premium notes, are, in my opinion, unauthorized by the statute. As I understand, it is claimed in this case that the corporation had the power to insure for cash those who should not become members. In other words, it could do all that a joint stock company could do. The two systems cannot be united. Those persons who obtained policies for cash only, are either members of the company, and if so, should be assessed for their proportion of the losses; or they are not members, and the agreements upon which their policies were issued were void, and the company incurred no liability upon the policies. There must be a new trial; costs to abide the event.

[ERIE GENERAL TERM, November 29, 1858. *Grover, Greene and Marvin*, Justices.]

WILLIAM WELLER vs. H. WELLER and others.

A testator, by his will, which took effect prior to the revised statutes, devised as follows: "I give and devise to my two sons, Moses and Abraham, the farm I live upon, to have and to hold to them, their heirs and assigns for ever, they supporting their mother thereon as above directed, and paying my just debts and funeral expenses, to be divided as equal as may be, share and share alike. If either Moses or Abraham should die and leave no lawful issue, then their portion or share of the land shall be equally divided between my son William and the survivor of them." Moses died in 1850, leaving one child, and Abraham died in 1857, leaving a widow, but no issue.

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Held that the limitation over to William was good as an executory devise; that he was entitled to an estate in fee in the one half of the lands devised to Abraham, exonerated from the dower of A.'s widow; and that the remaining half of such lands descended to the heirs at law of Abraham, subject to the dower of his widow.

ACTION for a partition. The rights and interests of the several parties depended upon the construction of the will of H. Weller, deceased.

Thomas McKissock, for the plaintiff.

E. A. Brewster, for the defendant H. Weller.

C. H. Winfield, for the defendant Catharine Weller.

BROWN, J. This is an action for the partition of certain lands in the county of Orange, and the two questions which I am to determine arise upon the construction of the will of Hieronimus Weller, deceased, the ancestor of the parties. The will bears date December 23, 1808, and was proved May 29, 1810. The clause of the instrument upon which the questions arise is in the following words: "I give and devise to my two sons, Moses and Abraham, the farm I live upon, to have and to hold to them, their heirs and assigns for ever, they supporting their mother thereon as above directed, and paying my just debts and funeral expenses, to be divided as equal as may be, share and share alike. If either Moses or Abraham should die and leave no lawful issue, then their portion or share of the land shall be equally divided between my son William and the survivor of them." Moses died in the year 1850, leaving one heir, an only child. Abraham also died in the year 1857, leaving a widow, the defendant Catharine, and no children or other descendants.

Upon these facts, which appear upon the face of the pleadings, I am of opinion that the limitation over is good as an executory devise. It is not open to the objection that the

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estate of William and the survivor of the two brothers, Moses and Abraham, is to take effect upon an indefinite failure of issue. The provision which limits a part of the estate to the survivor of the two is sufficient to rescue the limitation from the consequences which would otherwise ensue; because it shows that the testator intended issue living at the time of the death of the first taker. Nor is it an objection that there is no survivor to take the share not given to William. This provision of the will, which cannot be executed for lack of a survivor, may fail without impairing or destroying the other part of the limitation, unless the existence of a survivor is to be deemed a part of the contingency upon which the limitation over is to take effect; which I will notice hereafter. When a part is susceptible of execution and a part is not, that part which may be executed shall have effect, provided it can be separated from the other part.

It is contended that the limitation over is void, because at the time of the death of the first taker, who died without issue, there was no survivor, Moses having died before that time, leaving issue. Or, in other words, because there is no survivor to share the estate with William, the limitation over must fail. There are two objections to this proposition. First. The limitation over of the one half of the share to William was good as an executory devise, at the time of the death of the testator, or it was not. If it was a valid limitation (as I think it was) it cannot be less than valid now, because there is no person in being answering the description of the survivor to take the other part. Second. The proposition implies that the limitation over of the one half to William is upon condition that there shall be a survivor of the brothers Moses and Abraham in being at the time of the dying without lawful issue to take the other half. Now, the word survivor is employed to designate one of the persons who is to take under the limitation, and not to prescribe a condition upon which William's right to take shall depend. If either Moses or Abraham should die without lawful issue, then the one half of the lands

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given to the person so dying should go over to William. The word either is a distributive pronoun, signifying one of the first takers, and William's right to the estate depends upon no other contingency than the dying without lawful issue.

The argument assumes a different form when it is said that the limitation over must have effect whenever one of the two brothers, Moses and Abraham, should die, because otherwise there would be no survivor. In other words, by naming the survivor as one of the persons to take by force of the words of limitation, the testator intended that these words should have effect only in the event that the brother who first died should die without lawful issue. This construction concedes it to have been the testator's intention that if Abraham had died first, (as he died without issue,) William should take one half of the lands given to him, and that if Moses had died without lawful issue, William would also have taken one half of the lands given to him. And it goes very far, I think, to show an intention predominant in the testator's mind that William should have a portion of the lands upon the sole contingency of one of his brothers dying without lawful issue. The testator doubtless had in his mind the survivor of the two brothers to take the half of the deceased's share, should the contingency happen; because he so expresses himself in his will. But I think the expression is by no means to be regarded as indicating an intention that the limitation over must have effect whenever one of the first takers died, and not afterwards when the other died. If either Moses or Abraham should die without lawful issue—without saying at what time or in what order, or that the brother so dying should leave the other brother his survivor—then the estate of the brother so dying should go over, the one half to William and the other half to the survivor. This word survivor does not create a condition that there shall be a survivor in order to give the limitation effect, but its office is to denote one of the persons who is to take under it. To say that because the brother who died first left lawful issue the entire estate vested absolutely

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in both the first takers, is to interpolate a new condition, not expressed in the will nor implied from its language, and, one which the testator could not have contemplated.

The more difficult—and I may add really doubtful—question arises upon the right of Catharine, the widow of Abraham, to dower in the whole of the lands devised to him. If the estate vested absolutely in her husband upon the death of Moses before him, leaving lawful issue, then of course her right to dower is unquestionable. But assuming that the limitation over to William is valid, and that he is entitled to the half of her husband's interest, is she then entitled to her dower in the portion which thus vests in William? To entitle a widow to her dower the husband must have been seised of a freehold in possession, and also of an estate of inheritance in reversion or remainder. The freehold and inheritance must unite in the husband *simul et semel* during the marriage. It must have been such an estate that the issue of the wife might by possibility have inherited. These are the definitions furnished by the elementary writers; but it will be observed that the requisites named relate to the quality and not to the quantity of the estate. And according to Mr. Park, wherever they are mentioned in the books, it is to introduce the inquiry whether the quality of the wife's estate was such that her issue might have inherited, but never with a view to show that the quantity of the estate was such that it might endure so long as to be inheritable by her issue. The widow takes her estate through the husband, but not from him like one who inherits, for he can do no act which will divest her right. And when the estate of the husband is determined by the happening of an event which defeats its further continuance, the estate in dower must be determined with it. It is a part of the same estate of freehold and inheritance of which the husband was seised, and to the extent of it so much abstracted from what would otherwise descend to the heirs at law. Abraham Weller, by the express words of the will, took an estate in fee, but by subsequent words, which I think operative and effectual, it

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was made determinable upon his dying without issue living at the time of his death. When that event happened, the wife's right to dower ceased with the estate out of which it could only proceed. This conclusion conflicts with Lord Mansfield's judgment in the case of *Buckworth v. Thirkel*, (3 Bos. & Pul. 652.) It is the rule, however, given by Mr. Cruise in his treatise on the law of real property, (*tit. 6, Dower, ch. 3, § 33,*) and is the rule maintained by Mr. Park with singular ability in his work on the law of dower, page 174, to be found in the 11th volume of the *Law Library*.

I am therefore brought to determine that William Weller, the plaintiff, is entitled to an estate in fee in the one half of the lands devised to Abraham, exonerated from the dower of his widow Catharine. And the remaining half of such lands (there being no survivor of the two first takers) descends to the heirs at law of Abraham, subject to the dower of his widow Catharine.

The plaintiff will take the usual order of reference.

[ORANGE SPECIAL TERM, December 6, 1858. Brown, Justice.]

 SHELDON vs. SMITH and MORGAN.

Where one of two partners in a firm doing business here is absent in a distant state, and thus unable to assist in the management of the business, and to assent to such transfers of its property as the exigencies of its affairs may demand, *it seems* that such absence, if it does not warrant the remaining partner in making an assignment of the partnership property, in trust, for the benefit of creditors, will authorize the presumption that he was duly empowered to make such an assignment as attorney for the absent partner, until the contrary appears.

And no one but the absent partner can question the validity of an assignment thus executed. It is not void *per se*, but only voidable at the election of the absent partner.

If, upon his return, the absent partner affirms and ratifies an assignment, executed during his absence by his partner, in his name and as his attorney,

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such ratification will relate back to the time of the original execution of the instrument, and render the assignment valid and operative from that time.

Such assignment, being a complete and perfect deed immediately on its execution and delivery to the assignees, it is from that time entirely beyond the control of the resident partner, and he has no power to alter, amend or vary its terms or provisions.

Hence, he cannot vary its effect by making a note to a creditor, in the name of the partnership, after the execution of the assignment, and dating it back to a day prior to the execution of that instrument, for the purpose of having such note embraced in the schedule of debts preferred in the assignment.

THIS action was brought against the defendants, who are assignees of the copartnership firm of Stewart & Tunnicliff, to compel the payment out of the trust fund of a note of \$634.84, which it is claimed is, by the terms of the assignment, directed to be paid as one of the debts in the first class. The defendants were the sureties and accommodation indorsers of Stewart & Tunnicliff to a very large amount. The assignment was made primarily to secure the defendants, and provide for the debts for which they stood bound as sureties. The assignment bears date on the 21st of October, 1850, and was executed on that day by Tunnicliff, under his hand and seal, and it was at the same time executed by him as attorney for Stewart, and under seal. At the time of the execution of the assignment Stewart was in California. He returned in January, 1851, and on the 10th day of that month acknowledged the assignment, as thus executed, before the county judge of Yates county. At the time of the execution of the assignment the plaintiff held two demands against Stewart & Tunnicliff: one was a note of \$600, given in 1846, and on which the whole principal sum remained unpaid with about two years' interest, and which was signed by the defendant Smith as surety; the other debt was an open and unliquidated account, made up of items of cash and other matters of account, and balances due on one or two small notes, for which Stewart & Tunnicliff alone were liable. This debt, when settled and liquidated after the assignment, was found to amount to the sum of \$634.84. The assignment,

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by its terms, provides for the payment of "one note to Edgar Sheldon, about six hundred and thirty-four dollars and eighty-four cents, * * * (\$634.84.)" It appeared that Tunncliff furnished to the scrivener by whom the assignment was drawn a memorandum to guide him in the preparation of the assignment, which specified both debts due to the plaintiff as debts to be placed in the first class, and described them as follows:

"Note to Edgar Sheldon,	\$634.84
Account " " "	700.00"

After the assignment was executed by Tunncliff, as before stated, and accepted by the defendants, the plaintiff discovered that the account due to him from Stewart & Tunncliff had been, as he supposed by mistake, omitted in the class of preferred debts in the assignment, and on the 22d or 23d of October he induced Tunncliff to make a note for the balance of the account in the name of the firm, and date it on the 16th of October, prior to the assignment, so as to bring the debt within the description given in the assignment. All this was without the knowledge of the defendants. It was clearly proved in the case, that the note described in the assignment as a note to Edgar Sheldon, was intended by all the parties to the assignment, and by Mr. Glover, by whom the assignment was drawn, to describe the note on which the defendant Smith was liable as surety. The referee decided that the note of \$634.84, made after the date of the assignment, was the note directed to be paid by the assignment, and he gave judgment for the plaintiff. The referee put his decision upon the ground that the assignment was not complete until the acknowledgment by Stewart on the 10th of January, 1851, and that it must be regarded and treated as bearing date on that day. That at that time this note was actually made, and was then a valid note of the firm. And as the words of the assignment exactly describe this note, no evidence could be admitted to contradict or vary it. The defendants appealed from the judgment entered upon this decision.

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B. W. Franklin, for the appellants. I. The assignment took effect on the day of its date, and must be held to speak from that day. (1.) Tunnicliff might, as against every one but his copartner, make a valid assignment of the partnership effects for the payment of the partnership debts. The assignment was not void, as the referee seems to suppose. It was voidable only at the election of the copartner. (*Pierpont v. Graham*, 4 Wash. Cir. Co. Rep. 235.) (2.) The subsequent ratification by Stewart is equivalent to an original antecedent authority, and made the assignment operative from its date. This is so upon well settled principles. The acknowledgment by Stewart was a ratification of the act of Tunnicliff in making the assignment on the 21st of October, and not a new execution of it on the day of the acknowledgment. Stewart acknowledged that the instrument was his act and deed; that is, that the act of Tunnicliff in subscribing his name and affixing a seal thereto was his act, and that the deed thus created was his deed. This was not only the most solemn ratification known to the law, but it was equivalent to an original antecedent authority under seal. (*Lawrence v. Taylor*, 5 Hill, 107. *Green v. Seton*, 1 Hall's S. C. Rep. 270. *Mackay v. Bloodgood*, 9 John. 285. *Cady v. Shepherd*, 11 Pick. 400. *Story on Agency*, §§ 239-244.) (3.) But the assignment was good as to Tunnicliff; and for the purpose of this action that is all that it is necessary for the defendants to maintain. (*McBride v. Hagan*, 1 Wend. 326.) (4.) The plaintiff seeks to affirm the assignment, for he claims under it. He must, therefore, take it as it is; that is, as the act of Tunnicliff, intended to be complete on the 21st of October, and which, as to him at least, was in fact complete on that day. Stewart ratified it as an act performed for him by Tunnicliff, or his attorney, on that day. Stewart, after his solemn acknowledgment, would not be permitted to deny that the assignment was not complete on the day of its date; and as the plaintiff claims under him, he can claim nothing which Stewart could not. (5.) It is by no means clear that

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Tunnicliff could not, under the circumstances, make a valid assignment of the partnership effects under his general authority as a copartner. Stewart was out of the country, and could not be consulted. Tunnicliff had a right to do whatever the exigencies of the partnership required to be done. (*Anderson v. Tompkins*, 1 Brock. C. C. Rep. 462.)

II. If then the assignment is to be regarded as an instrument made and executed on the 21st of October, 1850, there was no such note as the plaintiff claims to have paid out of the trust fund in existence on that day; and there was nothing in the character or circumstances of this demand to which the descriptive words in the assignment could apply. The words, however, describe with sufficient certainty the note on which the defendant Smith was surety. They describe "one note to *Edgar Sheldon* for about \$634.84." The description is certain and accurate, so far as it describes a note to the plaintiff. The only uncertainty or misdescription is the amount of the note, or the amount due upon it, and as to that the assignment itself does not profess to be certain. If Stewart & Tunnicliff had owed no other debt to the plaintiff, the description would have been held sufficient, without any doubt, to authorize the payment of this note; and when it is considered that the primary object of the assignment was to indemnify the defendants in this action, as the sureties of the assignors, and that the other debt to the plaintiff was unliquidated, and so regarded by all the parties, there can be no reasonable doubt, independent of the parol evidence so freely admitted by the referee, but that the note of \$600, upon which Smith was liable as surety, was the note intended to be described by the parties to the instrument. If the parol evidence is allowed to have any weight, then it is clearly shown that such was the intention of the parties.

III. The note claimed by the plaintiff in this action was not the note of the partnership. The assignment by Tunnicliff was of itself a dissolution of the partnership, and his authority to make a promissory note in the name of the firm

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ceased on the 21st of October, 1850. The *note*, therefore, is not a contract of the firm, even if the debt, which is the consideration of the note, is a partnership debt. (*Story on Partnership*, §§ 101, 313. *National Bank v. Norton*, 1 *Hill*, 572.)

D. B. Prosser, for the respondent. I. The referee having found that Stewart & Tunnicliff, on the 16th October, 1850, were justly indebted to the plaintiff in the sum of \$634.84, the payment whereof was provided for in schedule A of the assignment, his finding should be regarded as final and conclusive upon these facts.

II. One partner cannot make a general assignment of the partnership effects to trustees, for the purpose of selling and distributing the proceeds among the creditors, in unequal proportions. (*Havens v. Hussey*, 5 *Paige*, 30. *Hitchcock v. St. John*, 1 *Hoff*, 511. *Deming v. Colt*, and *Hayes v. Heyer*, 3 *Sandf. R.* 284.) Tunnicliff, in assuming to execute the assignment as attorney for Stewart, acted without authority. *Such an act requires an express authority*. Here none was shown or attempted to be proven. On the contrary, it is admitted there was none. The assignment did not take effect, or speak for the firm, until the 10th day of January, 1851, after the execution or acknowledgment thereof by Stewart; until then it was wholly inoperative, and should be construed with reference to the facts as they then existed. A contrary construction would defeat the intention of the assignors; for at that time the plaintiff's demand was in a note, made with the express view of corresponding with the description in schedule A. It follows, if the assignment is to be construed with reference to the facts, as they existed on the 10th of January, 1851, the other question and objection raised and made on the hearing, are wholly immaterial.

III. The defendants have no right to complain of the judgment; they are not the losers thereby. It does not appear either in the pleadings or proof that any other person or persons are entitled to the fund in their hands.

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By the Court, E. DARWIN SMITH, J. Upon the basis on which the referee put his decision, I think this judgment cannot be sustained. The assignment was made, executed and delivered, by Tunnicliff, on the 21st of October, 1850. It was signed by himself, and by him as attorney for his partner Stewart, and at the same time signed by the assignees, and accepted by them, and possession of all the assigned property taken by them immediately by virtue of the same. At the time of such execution, delivery and acceptance, Tunnicliff was solely entrusted with the possession of the partnership property, and the entire management of the partnership affairs; and if he had not authority to convey such property to trustees, for the purpose of paying the partnership debts, he had the right to pay the creditors with it, and make such other disposition of the property as should be adapted to subserve the interest of the partnership.

If the absence of Stewart in California, and his entire inability to assist in the management of the concerns of the partnership, and to assent to such transfer thereof as the exigencies of its affairs might demand, did not warrant Tunnicliff in making this assignment, absolutely, it did, I think, authorize the presumption that he was duly authorized to make it as attorney for his partner, until the contrary appears, as against all persons but his absent partner; and no one else, I think, could question the validity of the assignment. It was not void *per se*, but at most voidable at the election of Stewart. (*Pierpont v. Graham*, 4 Wash. C. C. R. 232.) On his return from California, he might affirm or disaffirm the assignment. He did, in fact, affirm it. On the 10th of January, 1851, he acknowledged its execution in due form, as executed by himself; thereby distinctly affirming that it had been duly executed for him by Tunnicliff. He did not execute the assignment *de novo*. He acknowledged, and thereby ratified and confirmed it as then executed. This ratification related, necessarily, to the original execution of the instrument, and was the same, in legal effect, as if the assignment had, in

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fact, been executed by Tunnicliff at the time of its date, under the fullest and most ample power of attorney from his partner. (5 *Hill*, 107. *Story on Agency*, §§ 239, 244.) The deed was thus a valid and operative deed on and from the 21st of October, 1850. So far as Tunnicliff is concerned, and so far as he could make it valid, it was a complete and perfect deed immediately on its delivery to the assignees, after its execution by him and them. After such execution and delivery, Tunnicliff had no power over it to alter, amend, or vary its terms or provisions. It must stand as a perfect, consummated deed, entirely beyond his control from that time, and must be construed and carried into effect according to its terms, like all other instruments in writing. This view, in respect to the execution and force of the assignment, negatives, entirely, the theory upon which the referee founded his report, and upon which this judgment stands. The assignment must speak for itself. Parol proof was admissible, and is always admissible, to show the extrinsic facts to which the provisions in a written instrument relate, and to aid in its interpretation. Such interpretation must always be made in view of the surrounding facts as they existed at the time; but parol proof can have no further effect or operation. The deed must be construed by its own terms, and its provisions applied to such existing facts. Schedule "A" of the assignment contains a provision for the payment of one note to Edgar Sheldon of about \$634.84. It appears in proof, that the plaintiff had a note against Stewart & Tunnicliff for \$600, and an account of \$600 and upwards. In the statement made out by Tunnicliff for the attorney who drew the assignment, the claims of the plaintiff were stated thus:

Note to Edgar Sheldon,	\$634.84
Account to " " " " " " " "	700.00

The provision in the assignment will clearly cover this note. It will not apply to the account, because there was a note of about the requisite amount to satisfy the provision. The account, it appears, was liquidated on the 22d of October, by

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Tunnicliff and the plaintiff, and put into a note for \$634.84. This note would precisely answer the description of the plaintiff's debt in the assignment, but it was made the next day after the assignment was executed and delivered, and therefore cannot be considered in construing the assignment. It was not in existence when the assignment was made and became operative. The referee finds that this debt of \$634.84 was marked and described, and its payment provided for, in said schedule "A," annexed to the assignment. This finding is in conflict with the terms of the assignment, and is only sustainable upon the assumption that Tunnicliff had the right to alter the assignment before its confirmation by Stewart, and had therefore the right to give the \$634.84 note to take the place of the \$600 note held by the plaintiff, and to meet the precise description of the plaintiff's note contained in schedule "A." This assumption we have shown to be erroneous, and the conclusion falls with it, necessarily. It may be that the plaintiff is entitled to have this schedule reformed, so as to include the account which he had against Stewart & Tunnicliff at the time of the assignment, in addition to the \$600 note. But the complaint was not framed with such an aspect, and contains no prayer for such relief, and no point of that kind has ever been presented or discussed by counsel; and therefore I think we are hardly at liberty to take any such question into consideration. I think the judgment should be reversed, and a new trial granted, with costs to abide the event.

Judgment accordingly.

[MONROE GENERAL TERM, December 6, 1858. *Welles, Smith and Johnson*, Justices.]

WOOSTER and others *vs.* CHAMBERLIN.

It is the right of a party who is sued, to require that any other person jointly liable with him for the debt shall be made a co-defendant. The omission, by the plaintiff, to sue all the joint contractors, may be set up as a defense, in the answer, and is a complete defense to the suit.

If the answer, setting up such a defense, is defective, in not averring that the other joint contractor is still living, the defect may be cured by the proof, on the trial.

After full proof of the answer, and of all the facts essential to sustain the defense, without objection, it is too late to overrule the answer on the technical ground that it does not contain the averment that the joint debtor omitted to be joined as a defendant is still alive.

A PPEAL from a judgment entered upon the report of a referee. The following facts were established by the proofs: That in the year 1849, and prior and subsequent to that time, the defendant, Henry Chamberlin, and James Wood, jun. were attorneys and counsellors at law, doing business at Geneseo, in the county of Livingston, as joint partners, under the firm, name and style of Chamberlin & Wood. That in the said year 1849, one John S. Royce commenced an action in the supreme court against Sanford A. Hooper, by Chamberlin & Wood, his attorneys; that the action was defended by said Hooper; that on the 3d day of October, 1851, the plaintiff obtained the judgment against the said Hooper which is the subject matter of this action; that from that judgment the defendant Hooper appealed to the general term of the supreme court; that the general term affirmed the said judgment; that judgment of affirmance was entered up on the 23d day of February, 1855, and on the same day an execution was issued on said judgment by Wood, as plaintiff's attorney; that on the 18th day of April, 1855, the judgment was satisfied by the sheriff taking the note of Hooper, and that the sheriff settled with Chamberlin & Wood by applying the amount of the note so taken against Hooper, on a note which the sheriff held against Chamberlin & Wood. It also appeared that after the rendition of said judgment, and pending the said appeal, to wit, on the 29th January, 1854, Royce assigned the said judg-

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ment to William W. Wooster; that afterwards and before the commencement of this action Wooster died, and that the plaintiffs were appointed his administrator and administratrix. That in December, 1846, the plaintiff commenced this action, and in the complaint set forth the recovery of the judgment on the 3d day of October, 1851; that the defendant was one of the attorneys for the plaintiff in the action in which said judgment was obtained; that the said judgment was on the 1st day of January, 1854, assigned by said Royce to William W. Wooster, the plaintiff's intestate; that after the rendition of said judgment an execution was issued thereon to the sheriff of Livingston county; that the amount of said judgment and interest was collected by the sheriff, and on or about the 1st day of May, 1855, were paid by the sheriff to the defendant, Henry Chamberlin, as the attorney in said action; that payment to the amount of said judgment and interest, inclusive of costs, was in October, 1856, demanded of the defendant, and the plaintiffs demanded judgment for \$320.67, and interest from the 3d day of October, 1851. The defendant's answer set up, 1. A general denial of the allegations of the complaint. 2. That at the time of the commencement of the said action of Royce v. Hooper, the defendant and James Wood, jun. were joint partners in the practice of the law, doing business under the firm name and style of Chamberlin & Wood; that the said firm was retained by Royce to commence and prosecute the said action; that they did prosecute the same, and that the money collected on the judgment in said action was paid to and received by the said Chamberlin & Wood as the attorneys for Royce, and not otherwise. 3. That at the time of the assignment of said judgment by said Royce to Wooster, the said Royce was indebted to Chamberlin & Wood in the sum of \$1000 for professional services rendered by said firm for Royce at his request, and which was due and owing from said Royce to Chamberlin & Wood at the time of said assignment, and claimed to set off so much of said indebtedness as would be sufficient to pay any claim that

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the plaintiff might establish on the trial. 4. That the said Chamberlin & Wood had a lien on the moneys collected on said judgment, for services rendered on the appeal, to the amount of \$200, and claimed that that sum should be deducted from the amount of said judgment in the hands of the assignee. To this answer there was no reply. The action was tried before a referee, who reported in favor of the plaintiff for \$331.11, for which sum judgment was entered.

James Wood, for the appellant.

A. M. Bingham, for the plaintiff.

By the Court, E. DARWIN SMITH, J. The complaint in this action states that the defendant was one of the attorneys for the recovery of a judgment in favor of Royce against Hooper, which it claims was paid to the defendant. The money which it is claimed was received by the defendant, by the plaintiff's own showing, was received by him as one of a partnership, composed of two or more attorneys. The answer sets up that the said partnership was composed of the defendant and James Wood, jun., who are jointly liable to the plaintiff for such money. The answer sets up a perfect defense in the non-joinder of Wood as a co-defendant. The only exception which could have been taken to such answer on demurrer, is that it does not aver that said Wood was still living. This defect was entirely cured by the proof on the trial. The said partner, Wood, was called as a witness, and fully proved the answer, without dissent or objection. After full proof of the answer and all the facts essential to sustain the defense, it was too late to overrule this answer or the defense interposed by it, on the technical ground that the answer did not contain the averment that Wood was still alive. The objection should then have been disregarded by the referee, or the answer allowed to be amended, to conform to the proof. It is the right of a party who is sued, to require that any other person jointly

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liable with him for the debt shall be made a co-defendant. The omission of a plaintiff to sue all the joint contractors may be set up as a defense, and is a complete defense to the suit. The non-joinder is matter to be set up in bar of the action, and is to be treated like any other valid defense. (*Leavitt v. Tuttle*, 4 Kern. 465.) The referee clearly erred in overruling the defense in this case, and the judgment should be reversed and a new trial granted.

New trial granted; costs to abide the event.

[MOXROE GENERAL TERM, December 6, 1858. Welles, Smith and Johnson Justices.]

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SMITH vs. THE NEW YORK AND NEW HAVEN RAIL ROAD COMPANY.

A right of action against a common carrier, for negligence in not transporting and delivering personal property, is assignable, so as to authorize the assignee to sue in his own name.

THIS action was commenced by summons issued by a justice of the peace for the county of Westchester. The plaintiff filed his complaint in writing against the defendants, as common carriers, for negligence in not delivering to one Sanford Hallock, at Mount Vernon, in said county, four barrels of flour and one barrel of crackers, of the value of \$48.50, and alleged an assignment of the claim to the plaintiff. To which complaint the defendants demurred, orally: 1st. That the complaint contained no cause of action. 2d. That the said claim was not assignable. The demurrer was sustained, and judgment was entered for the defendants. On appeal to the county court of Westchester county, the judgment of the justice was reversed; and the defendant appealed.

R. H. Coles, for the appellant.

P. L. McClellan, for the respondent.

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By the Court, EMOTT, J. In *McKee v. Judd*, (2 Kern. 622,) the court of appeals held that where goods had been wrongfully taken and converted, and the owner, afterwards, having become insolvent, made a general assignment of all his property and things in action for the benefit of his creditors, the right of action for damages passed, and a suit could be maintained for the conversion, by the assignee, and since the code, in his own name. (In *Zabriskie v. Smith*, (3 Kern. 322, 332,) the same court held that a right of action for damages, sustained in consequence of a false representation as to the credit or solvency of a third person, was not assignable. The learned judge who delivered the opinion in the latter case, declares the former decision to be good law, and that the court do not intend to overrule it. It is evident, however, that the present action must come within the decision in *McKee v. Judd*. Actions and rights of action, for the conversion of personal property, are distinguished from actions for deceit and false representations, it seems, because the former are considered as more properly, in the language of the supreme court of Pennsylvania, in *O'Donnell v. Seybert*, (13 Serg. & R. 54,) actions "of property." That is, I suppose, they are actions relating to, and founded on, the ownership of certain definite articles of property. It is quite obvious, I think, that an action against a common carrier, for not transporting specific articles committed to his charge, comes as clearly within this category as an action for taking or detaining such property. If the defendants in this case were charged with absolutely converting this property to their own use, the party who had sustained the injury could assign his right of action for it, by the express authority of *McKee v. Judd*. Would it not be absurd to say that an equally entire loss of the property to the owner, occasioned by the wilful or negligent conduct of the defendants while intrusted with the property as carriers, will create so different a kind of demand or cause of action that it cannot be transferred or assigned.

In *Zabriskie v. Smith*, the learned judge who delivered the

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prevailing opinion, adopted a test of the assignability of causes in action, which I think will clearly sustain the present suit. The rule by which the cause of action in that case was held not to be assignable, was that it would not survive to the personal representatives of a party in case of his death. The same test had been applied in several previous cases. (*Raymond v. Fitch*, 2 Cr. Mees. & Welsby, 588. *The People v. Tioga C. P.* 19 Wend. 76. *Comegys v. Vase*, 1 Peters, 213.) It might be contended that such a case as the present is clearly within the equity of the statute giving to executors, &c. actions of trespass against any person who shall have wasted, destroyed, taken or carried away, or converted to his own use the goods of the deceased. (2 R. S. 114, § 4.) But there is another statute which was not adverted to by the court in the case in 3 Kernan, but by which such a cause of action as the respondent relies upon in this case will survive in case of the death of the party injured. By 2 R. S. 447, § 1, "For wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or after his death by his executors or administrators, against such wrongdoer, and after his death against his executors or administrators, in the same manner and with the like effect in all respects, as actions founded on contracts." There is no doubt that the rule of the common law was otherwise, as stated in *Zabriskie v. Smith*. But I am not able to see any greater doubt that this statute was intended to change the rule of the common law, and did establish a different rule as to all cases but those of mere *personal injuries*, not affecting property, rights, or interests of another, as such. The wrong need not be done to any specific property, if it affect a right or an interest. These are terms of wide signification. They might and probably would include the right of personal security and of the enjoyment of character. So the revisers and the legislature seem to have understood and intended. The revisers, in their note to this and the next section, (3 R. S. 781, 2d ed.) say, "The

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maxim that 'a personal action dies with the person,' has long ceased to be true. Legislatures and courts have steadily and gradually enlarged the liabilities of executors: but there still remain some cases unprovided for. The instance of overflowing land; of deceits and false representations; of violation of duty by public officers, as sheriffs for escapes, &c. and many others might be mentioned, in which injured parties are now remediless. The exceptions, it is believed, are all that should be made. The general object of all law being the protection of those under its control, by affording the means of redressing their wrongs, it is not perceived how the death of the wrongdoer should exempt his property from the burden of that redress." The intention is clearly disclosed here to abolish, substantially, the rule *actio personalis moritur cum persona*; or at least to narrow its application to mere personal torts. That this was the purpose of the revisers, and that it was adopted by the legislature, is I think plain from § 2 of the same article, which immediately succeeds that which I have quoted, and contains the exceptions referred to in the revisers' note. It declares that the preceding section "shall not extend to actions for slander, for libel, or to actions of assault and battery, or false imprisonment, nor to actions on the case for injuries to the person." These exceptions, which are all that were intended or made, show how far the legislature meant to go in preventing the abatement of causes of action. If they do not preserve a right of action for a deceit or false representation which is not the question here, and which probably was not considered by the court of appeals in *Zabriskie v. Smith*, since those sections were not adverted to, they must certainly continue a right of action for a neglect of duty in the custody or the conveyance of property. I cannot see any question that such a right of action is within the purview of the first section, and not within the exceptions in the second. If this be so, and if the power to transmit to personal representatives and to assign are convertible propositions, as has been said by high authority, then the action was properly brought.

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The justice was wrong in sustaining the demurrer, and the judgment of the county court, reversing his decision, must be affirmed.

[KINGS GENERAL TERM, December 14, 1858. *S. B. Strong, Birdseye and Emott, Justices.*]

LYON vs. THE CITY OF BROOKLYN.

The true and exact apportionment of the expenses of grading and paving streets in cities can never be determined by any fixed rule. Like the assessment of unliquidated damages by a jury, the sum to be contributed by each owner must rest in the judicial discretion of the assessors. The most that can be attained, or hoped for, is an approximation to what is just. *Per BROWN, J.*

From the very nature of the duty assigned to assessors, their power in determining the amount which each particular piece of property chargeable shall contribute, must be nearly absolute, and their report or assessment roll final and conclusive; unless it is of such a character as to shock common sense, and furnish intrinsic evidence of fraud, or other misconduct. *Per BROWN, J.*

The supreme court cannot legally vacate or set aside an assessment for the expenses of grading and paving a street in the city of Brooklyn, upon the sole ground that the assessors have not distributed the expenses of the improvement in due proportion upon the lands which are chargeable.

APPEAL from a judgment of the city court of Brooklyn, overruling a demurrer to the complaint. The plaintiff, by his complaint, sought to have a certain assessment and sale, and the proceedings therefor, adjudged illegal, irregular, and void, and for other relief. The assessment was for grading and paving Bush street, from Court street to Hamilton avenue, and the complaint charged that the expense of said improvement was not assessed upon the property benefited thereby in proportion to the amount of said benefit, inasmuch as the true value of the said lot before and at the time of said improvement was only three hundred dollars, while the assess-

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ment imposed upon said lot exceeded the value thereof, after said improvements, by upwards of two hundred dollars. The complaint did not point out any defect or irregularity in the proceedings to lay the assessment. The defendants demurred to the complaint. The city court of Brooklyn overruled the demurrer. The plaintiff entered judgment, and the defendants appealed.

D. P. Barnard, for the plaintiff.

S. E. Johnson, for the defendant.

By the Court, BROWN, J. The prayer of the complaint in this action is, that an assessment of the expenses for grading and paving Bush street, from Court street to Hamilton avenue, in the city of Brooklyn, may be adjudged illegal, irregular and void, and that the certificate of the sale of the plaintiff's lands to satisfy the moneys charged thereon by the assessment be delivered up and canceled. The case comes here upon an appeal from the city court, where it was decided against the defendant upon demurrer to the complaint. No other error or irregularity is alleged in the proceedings of the assessors and common council but this, "that the expense of the improvement for grading and paving the street was not assessed upon the property benefited in proportion to the amount of the benefits." It is not thought that the common council of the city have omitted to take in due form any of the proceedings required by law; or that the assessors have neglected any necessary act on their part, or committed any fraud or other wrongful act. But the court below was asked to vacate the assessment and the subsequent proceedings for the collection of the money, upon the sole ground that the assessors had not distributed the expenses of the improvement in due proportions upon the lands chargeable. The true and exact apportionment of the expenses can never be determined by any fixed rule. Like the assessment of unliquidated damages by a jury, the sums to be contributed by each owner

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must rest in the judicial discretion of the assessors. What would seem just to one set of men might seem quite unjust to another, and the most that can be attained, or hoped for, is an approximation to what is just. Were the courts to interfere and vacate these verdicts, for no other reason than a difference of opinion between the judges and assessors in regard to the quantity of expense chargeable upon a particular piece of land, few street assessments would be able to stand. From the very nature of the duty assigned to the assessors, their power over the sums of money which each particular piece of property chargeable shall contribute must be nearly absolute, and their report or assessment roll final and conclusive, unless it is such as shall shock the common sense, and furnish intrinsic evidence of fraud or other misconduct.

The 23d section of the 4th title of the act of the 17th April, 1854, to consolidate the cities of Brooklyn and Williamsburgh, directs the assessors to assess the expenses of such improvements upon the several lots, pieces or parcels of land benefited, in proportion to the benefit which, in their opinion, the same shall derive from, or in justice ought to be assessed for, the improvement. The same question arose in the case of the *Owners of Ground &c. v. The Mayor &c. of Albany*, (15 *Wend.* 374,) which was a certiorari to review the inquisition of a jury apportioning the damages incurred in the opening of a street. Amongst other errors, it was alleged that the jury had assessed certain property without regard to its limited use. On that point Chief Justice Savage remarked, "Whether the assessment is just or not, is not a question for us. It is whether it is lawful; whether the property was lawfully liable to assessment. On that subject there can be no reason to doubt. It was, therefore, subject to assessment. In my opinion, that assessment should have been only nominal. Those whose province it was to decide the question thought otherwise. Whether they are right depends on the probability there is that the lots may hereafter be converted to uses other than those to which they are

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now appropriated. If an error has been committed in the amount of the assessment, we cannot correct it." (*See also Albany and West Stockbridge R. R. Co. v. The Town of Canaan*, 16 Barb. 244; *Bouton v. The City of Brooklyn*, 15 *id.* 395.)

It is said, however, that the demurrer admits the truth of the statement in the complaint, that the expense of the improvement was not assessed upon property benefited thereby in proportion to the amount of the benefit. If the effect of the demurrer is to be limited to an admission of the truth of the exact words of the complaint, then it becomes of consequence to ascertain whether the language, thus admitted to be true, asserts a fact which, in connection with the preceding allegations of the complaint, make out a cause of action. The 23d section of the act to which I have referred does not require that the expenses shall be assessed upon property benefited in proportion to the benefits, but upon property benefited in proportion to the benefit which, *in the opinion of the assessors*, the same shall derive from the improvements. So that, upon strict technical rules, the complaint is itself defective in omitting a most material qualification in the mode of making the estimate. This view is altogether too technical. We are to look at the substance of things. If the important words, "in their opinion," were omitted from the act, as they are from the complaint, they would still be implied; because the degree and value of the benefits which the improvement confers upon a given piece of property cannot be otherwise than matter of opinion. It cannot be measured by any other standard. The demurrer must, therefore, be taken to admit the fact set up in the complaint, qualified by the words which I have quoted, and which are to be implied, and nothing more. See to what result any other construction would lead. If the defendant should answer, he would aver that the expenses were assessed upon property benefited, in proportion to the benefits which it derived from the improvement. Thus there would be an issue which this court has said it could not consider

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and determine, because the law confided it to another tribunal. We should then have reached the question presented by the demurrer, to wit, whether the court can legally vacate and set aside an assessment for the expenses of grading and paving a street in the city of Brooklyn, upon the sole ground that the assessors have not distributed the expenses of the improvement in due proportions upon the lands which are admitted to be chargeable.

The judgment of the city court should be reversed.

[KINGS GENERAL TERM, December 14, 1858. *S. B. Strong, Emott and Brown, Justices.*]

 RIDGWAY vs. BARNARD.

Where a sheriff dies, while in office, after having taken a bond for the jail liberties from a person imprisoned upon a *ca. sa.*, and a new sheriff is thereupon appointed, and a certificate of his appointment signed by the county clerk, is served upon the under sheriff, such prisoner, and the bond for the jail liberties, must be assigned by the under sheriff to the new sheriff, within ten days, or the prisoner will be at liberty to go at large. After the expiration of that period, the new sheriff has nothing to do with the prisoner, and the power of the under sheriff is at an end.

Hence, no action can be maintained, upon the bond, by an assignee of the under sheriff, by virtue of an assignment executed after the expiration of the ten days.

APPEAL from a judgment entered at a special term. The action was upon a bond given to the late sheriff of Kings county, upon his admitting to the jail limits, or jail liberties, one James Conroy, who was imprisoned on a *ca. sa.* The plaintiff claimed to recover upon the bond, by virtue of an assignment thereof, executed by the under sheriff of the former sheriff, some seven months after the appointment of a new sheriff and notice thereof to the under sheriff. Judgment was given for the defendant, and the plaintiff appealed.

Ridgway v. Barnard.

James Ridgway, plaintiff, in person.

Daniel P. Barnard, defendant, in person.

By the Court, BROWN, J. I still think, as I thought upon the trial, that the plaintiff cannot recover in this action. Whatever rights he has to the bond he derives under the assignment from Caspian A. Sparks, late under sheriff of the county of Kings; and unless his assignor could have maintained an action upon the bond, no right of action passed to the assignee. The bond was given to Jerome Ryerson, late sheriff of Kings, upon admitting to the limits of said liberties James Conroy, imprisoned upon a *ca. sa.* at the suit of Margaret Daker. The sheriff died on the 31st of March, 1857, after the execution of the bond, and while the prisoner Conroy was in custody upon the limits, leaving Caspian A. Sparks his under sheriff. On the 6th of April, 1857, Burdett Stryker was duly appointed the sheriff, and on the same day he served an official certificate of his appointment and qualification upon the under sheriff, Sparks, pursuant to the 70th section of the act in regard to proceedings on the election or appointment of a new sheriff. (2 R. S. 438.) Sparks neither assigned the prisoner Conroy nor the bond in question to the new sheriff. The witness Sparks testified that the bond could not be found in time to be assigned to the new sheriff. No question was made upon the trial as to the escape of Conroy, but the only point in dispute was the right of the under sheriff to retain him in his custody after the lapse of ten days from the time of the service of the certificate of the election and qualification of the new sheriff. Section 72 of the act directs the former sheriff, within ten days after the service of the certificate, to deliver to his successor the jails, prisoners, process, orders, rules, commitments, writs, &c. enumerated in the subdivisions 1 to 5 of the section. And section 71 declares that upon the service of the certificate, the powers of the former sheriff, except when otherwise provided by law, shall cease. The case of *Hinds v*

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Doubleday, (21 *Wend.* 223,) is decisive of the question in dispute. The court there held that the statute not only confers a benefit but imposes a duty upon the old sheriff. That if he could maintain an action for an escape when he had omitted to assign over the prisoner, he would be driven to allege his own breach of duty in order to maintain the action. The court came to the conclusion "that the legislature intended the powers of the old sheriff, in relation to all prisoners in his custody, should cease within ten days after the service of the certificate that the new sheriff had entered upon the duties of his office. If the common law powers of the old sheriff to continue the execution of final process against the body is taken away by the statute—as I think it is—prisoners who are not assigned within the ten days will be at liberty to go at large. The new sheriff has nothing to do with them, and the power of the old sheriff is at an end. If he cannot enforce the imprisonment by direct means, he cannot do it indirectly by suing the bond given while the restraint was legal." I cannot distinguish between that case and the present. That was an action by the sheriff on the bond, and this is brought by the late sheriff's assignee. In all other respects they are identical.

The judgment should be affirmed.

[KINGS GENERAL TERM, December 14, 1858. *S. B. Strong, Emott and Brown*, Justices.]

THE MIDDLETOWN BANK *vs.* MORRIS & GRAVES.

A check, drawn upon a bank in the city of New York, by T., payable to the order of M., and indorsed by M. & G., and held by C., claiming to be the owner, and who resided in another state, 73 miles distant from the city of New York, and due and presentable on the 25th of May, was discounted by the plaintiff on the 28th of May, and transmitted to its agent in New York by the first mail thereafter, and the same was received by the agent on the 29th and presented to the drawee, for payment, on the 30th of May. *Held* that although the check was made eleven days before the time it bore date, and was not designed by the maker and indorsers for immediate presentation and payment, yet that, as the plaintiff received the same without notice of those circumstances, he was to be deemed a holder in good faith, and for value, and entitled to all the rights of an indorsee of negotiable paper, under the law merchant.

Held also, that under the circumstances the plaintiff might fairly assume that the check was created and indorsed with a view to its being put in circulation.

Held, further, that by making the check payable at a future day, both the maker and the indorsers intended that the holder might either put it in circulation, or return to his place of residence and retain it in his possession until the time of its maturity.

And the holder having returned home, taking the check with him; and it appearing that no more time had been spent in presenting the check than would have been required for the passage of a letter from his residence to the place of payment; it was *held* that reasonable diligence had been used by the plaintiff, to charge the indorsers.

APPEAL from a judgment entered at a special term. The action was brought by the plaintiff as indorsee, against the defendants as indorsers, of the following check:

“New York, May 24, 1857.

Bowery Bank pay to P. Morris, Esq're, or order, five hundred dollars.

\$500. (Signed) JOSEPH S. TAYLOR.

Indorsed—Pay R. GRAVES, Treasurer.

PETER MORRIS.

Pay SAM'L CONKLIN.

R. GRAVES, Treasurer.

SAMUEL CONKLIN,

Bradford.

A. C. KING.”

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The defendant Morris, by his answer, alleged that Taylor, the drawer of the check, (being then confined to his residence in said city of New York, of a sickness whereof he afterwards died,) sent the said check to this defendant to be by him delivered to the defendant Samuel Conklin. And that this defendant did thereupon, at the said city of New York, indorse and deliver the same to said Conklin, but the defendant alleged that such indorsement by him was for the sole purpose of making the said check negotiable, and not otherwise, and that he never received any consideration whatever therefor. And he further alleged, upon information and belief, that the plaintiff received the said check long after the same became due and payable, and long after the time when it should have been presented to the drawee thereof for payment, and that the said plaintiff was not a *bona fide* holder of said check for a valuable consideration in the usual course of business. And the defendant denied that the said check was duly delivered to the plaintiff, for value received. The defendant denied that the said check was duly presented for payment, or that payment thereof was duly demanded at the Bowery Bank, or that due notice of such demand and refusal was given to him. And he alleged, that had said check been duly presented for payment to the drawee thereof, the same would have been paid.

The defendant Graves, in his answer, alleged that when he indorsed said check, he was treasurer of the McLean County Coal Company, and that he indorsed the same as such treasurer, and not otherwise, and for the sole purpose of making the same negotiable, and without receiving any consideration therefor; and that the plaintiff received the said check long after the same became due and payable, and long after the time when it should have been presented to the drawee thereof for payment, and he denied that the said check was duly delivered to the plaintiff for value received. He denied the other allegations in the complaint, and averred that had said check been duly presented for payment to the drawee thereof, the same would have been paid.

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The facts appearing on the trial are stated in the opinion of the court. The plaintiff had judgment, for the amount of the check, with interest; and the defendants appealed.

J. G. Wilkin, for the plaintiff.

J. M. Van Cott, for the defendants.

By the Court, BROWN, J. The Middletown Bank is a moneyed corporation transacting its business at Middletown in the county of Orange, 73 miles distant from the city of New York. On the 28th of May, 1857, it received the check which is the subject in controversy, in the usual course of business, and advanced the money upon it without any notice or knowledge of the circumstances under which it was given. Its officers saw by an inspection of the paper that its date was the 24th of May, 1857, which was Sunday. That it was therefore due and payable on Monday, the 25th of May. That it was drawn upon the Bowery Bank in the city of New York, payable to the order of the defendant Peter Morris, and that it was indorsed by him and also by the defendant Roswell Graves. The officers of the bank were also made aware that it was held by Samuel Conklin, claiming to be the owner, who resided in the state of Pennsylvania. The bank is therefore to be deemed a holder in good faith and for value, and entitled to all the rights which the law merchant assures to the indorser of negotiable paper. Finding the check payable to order, with two names upon it as indorsers, in the hands of a resident of another state, 73 miles distant from the place of business of the drawer, and three days only after it was due and presentable for payment, the bank might fairly assume that it was created and indorsed with a view to its being put in circulation. Why it was made payable to the order of the payee; why the payee and another person put their names upon it as indorsers and passed it away to a resident of another state, if it was not designed for circulation, it would be difficult to say.

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If we look at the facts which attended the issuing of the check, and which were unknown to the bank, we shall see that it was not designed by the maker and the two indorsers for immediate presentation and payment. Taylor the drawer, and Morris & Graves, the indorsers, were jointly concerned in the purchase of certain coal lands in McKean county, Pennsylvania, from Samuel Conklin, the person who passed the check to the bank. On the 14th of May, 1857, it was drawn, indorsed and delivered by Graves to Conklin, at the office of Graves in the city of New York, in payment of Taylor's share of the coal lands. This was eleven days before it was payable and in a condition for presentation. Had it been dated on the day it was delivered over to Conklin, the contract of the indorsers would doubtless have been to pay the check upon condition that it should be presented to the drawee on the ensuing day, payment refused and the requisite notice of non-payment given to them. It would, in that case, have made no difference that Conklin was a resident of Pennsylvania, because the check being payable presently and delivered to him in the city of New York, the residence or place of business of the drawer, there would have been a want of reasonable diligence had he omitted to present it, either on the day he received it or on the day thereafter. The question is one of diligence, exclusively, and we are to determine from all the circumstances what were the obligations of the holders of the check, in order to bring themselves within the rule of reasonable diligence.

The contract of the indorsers is to pay, in default of the drawee, upon condition that the paper is presented within a reasonable time after it becomes payable and due notice of non-payment. This reasonable time depends upon no fixed inflexible rule, but upon the circumstances of each particular case. If a check on a banker be delivered to a person at a place distant from the place where it is made payable, it will be sufficient to forward it by the post, or otherwise, to some person residing at the latter place, on the day after it is received; and it will be sufficient for him to present it on the third day. And it has

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been held that a London banker who receives a check by the general post, is not bound to present it for payment until the following day." *Chitty on Bills*, 10th ed. 376, citing *Ruckford v. Ridge*, (2 Camp. 537,) where Lord Ellenborough says, "The rule to be adopted must be a rule of convenience ; and it seems to me to be convenient and reasonable that checks received in the course of one day should be presented the next. Is this practice consistent with the law merchant? It cannot alter it. Banks would be kept in continual fever if they were obliged to send out a check the moment it was paid in. The arrangements mentioned by the plaintiff's witnesses appear subservient to general convenience and not contrary to the law merchant, which merely requires checks to be presented with reasonable diligence." The check in dispute was delivered over to Conklin, in payment for his land, after it was indorsed by the defendants, and eleven days before it was payable. It was in fact payable on time. What was Conklin to do with it in the mean time? He resided in Pennsylvania. Was it reasonable and convenient that he should remain in New York waiting for the check to mature, that he might present it on the exact day? Or was he to employ an agent to take charge of and present it at the proper time? Was that his contract with the persons from whom he received it? Or was it not, rather, to be implied from the nature of the transaction that he was to put the check in circulation as other paper payable on time? Or otherwise, that he was to take it home with him to his own place of residence, and there at its maturity transmitting it in the usual way for presentation and payment? The latter disposition of it was, I think, more reasonable and just than any other, because, by making it payable in the future, both the maker and the indorsers intended the person to whom they paid it might either put it in circulation or return to the place of his residence and retain it in his possession until the time of its maturity. This is what Conklin did. He returned to his place of residence, taking the check with him. It appeared by the proof that letters

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were from three to five days, by the regular course of the mail, in passing from his residence to the city of New York. The check was discounted by the plaintiff on the 28th of May, and transmitted to the North River Bank in New York by the first mail thereafter. The North River Bank received it on the 29th, presented it to the drawer for payment on the 30th, at which time the drawer's funds had disappeared and payment was refused, and due notice thereof given to the defendants. It was just five days from the time it became payable until it was presented. In the case of the *Mohawk Bank v. Broderick*, (13 *Wend.* 133,) the holder of a check failed to recover of the indorsers, because twenty days were suffered to elapse between the date—it being payable presently—and the time of its presentation for payment, there being a daily mail between the place of business of the holder and that of the drawer. In *Gough v. Staats*, (13 *Wend.* 549,) the parties to the check resided in the same place, and the indorser was held to be discharged because the holder allowed six days to elapse after the check might have been presented, and before presentation. *Smith v. James*, (20 *Wend.* 192,) was an action to recover from the indorser the amount of two checks drawn upon the Commercial Bank of Buffalo; one dated July 17th, 1836, made payable to the order of and indorsed by the defendant, who resided in New York. It was indorsed over to the plaintiff in the latter city by Wood & Bogert on the 27th July, who on the same day indorsed it over to F. H. Popoon. It was presented to the bank and protested on the 4th of August thereafter. The facts in regard to the other check were the same, except that it was dated on the 28th, negotiated to the plaintiff on the 29th of July, and by him indorsed over to F. H. Popoon on the same day, who presented it for payment and had it protested on the 9th of August. The material feature in the case is, that the checks were put in circulation. The court say, "The plaintiff would have been chargeable with want of due diligence if he had not put the check in circulation. Three days were necessary for the trans-

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mission of the check from New York to Buffalo, and it could not have been in circulation more than four or five days before it was presented to the bank for payment. There is no authority for imputing laches on such a state of facts, and the judge was right in overruling the objection." The court refer to the cases of *Robinson v. Ames*, (20 *John* 146;) *Gowan v. Jackson*, (*Id.* 176;) *Aymar v. Beers*, (7 *Cowen*, 705.)

In the present case Taylor drew and post-dated the check, payable to the order of Morris. He indorsed it over to Graves, who in turn indorsed it over to Conklin, who passed it to the plaintiff. It was created and indorsed with a view to its being put in circulation, and to this end the defendants contributed. Even if Conklin had himself transmitted the check from the place of his residence by the regular course of the mail as soon as it became payable, it is by no means certain that it could have been presented for payment in the regular course of business any sooner than it was.

The judgment should be affirmed.

[KINGS GENERAL TERM, December 14, 1858. *S. B. Strong, Emott and Brown*, Justices.]

SOPHRONIA GAGE vs. DAUCHY and BEEKMAN.

A wife may confer upon her husband the use or income of her separate property, as a gift; and her acquiescence, or assent to its receipt or use by him, is evidence of a gift by her.

Where a married woman, owning a farm, in her own right, goes into the possession of it with her husband, and occupies it, with him and their family, she permitting him to cultivate the land—but without any agreement as to the rents or produce—and to use the proceeds in the support of herself and family, and to sell, exchange and deal with the crops at his pleasure; she thereby confers on him rights which cannot be withdrawn or repudiated when his creditors seek to collect their demands out of property for which he has exchanged the produce of the farm.

Both at law and in equity property thus purchased by the husband belongs to him, and may be seized by his creditors.

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THIS action was brought to recover the value of certain personal property to which the plaintiff claimed title under a chattel mortgage executed to her by Phineas L. Goodwin and Angelina A. Goodwin his wife.

The defendant justified the taking and conversion under a judgment and execution against said Phineas L. Goodwin. The issue was tried at the Niagara circuit in February, 1858, before Mr. Justice GROVER, and the plaintiff had a verdict. The facts upon which the question now presented arises, were substantially these: In the year 1855 Angelina F. Goodwin purchased a farm of 65 acres in Hartland, Niagara county, with her separate property, and the same was conveyed to her; and with her said husband, Phineas L. Goodwin, and their family, she moved upon said farm, and they have since resided thereon. The said Phineas has cultivated and carried on the farm, raising divers crops thereon, yearly; and the property in question, or the greater part thereof, was purchased by him by exchanging grain raised on said farm therefor. There was no agreement between Mr. and Mrs. Goodwin to pay him any thing for his services on said farm; nor does it appear that there was any agreement between them in relation to the carrying on of the farm, or the rights and interests of either in the produce. The team used on the farm belonged to Goodwin, and the work of the farm was done by himself and family; except some labor during harvest, for which it appeared Mrs. Goodwin paid in part, and he the residue. It appears from the rulings of the court that the material question became whether Phineas L. Goodwin had any title or interest in the property in question. The court, amongst other things, charged the jury, "that if Mrs. Goodwin owned the farm she was entitled to the crops raised thereon, unless she made some agreement with some other person giving an interest in the crops to another." To this charge the defendants duly excepted. "The court further charged the jury, that if Mrs. Goodwin owned the farm and lived on it with Mr. Goodwin, her husband, and Mr. Goodwin worked upon the farm and be-

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stowed his labor in raising the crops upon the farm, he would not acquire any title to the crops, unless there was an agreement made by which he was to have an interest in them or to have the use of the land." And "that if Mrs. Goodwin owned the farm and crops, and purchased or caused to be purchased for her the sleds in controversy, and paid for the same from grain raised on the farm, or her other separate property, in good faith, she would own the sleds, and Mr. Goodwin would have no title in them." To these and several other propositions of the charge, involving similar points, the defendants' counsel duly excepted. The defendants then requested the court to charge, that if the jury believed that the cultivation of the farm was by the consent of the wife, express or implied, carried on by the husband in the absence of any agreement by his wife to compensate the husband for his services, the wife in the usual manner superintending the household, the law would hold the farm to have been cultivated for the benefit of the husband, subject to his duty to account to the wife for the value of the use of the same. The court declined so to charge, and the defendants excepted. The defendants also requested the court to charge that a wife, living and cohabiting with her husband, cannot for her own benefit, and to the exclusion of her husband, carry on the business of farming, and that the carrying on of such business, under such circumstances, although in the name of the wife, the law will hold to be for the benefit of the husband, and he will be entitled to the produce and profits of the business ;" which request the court refused, and the defendants excepted. The defendants also requested the court to charge the jury generally, that the plaintiff was not entitled to recover, which the court refused to do, and the defendants duly excepted. From the judgment entered on the verdict for the plaintiff, the defendants appealed.

G. D. Lamont, for the appellants.

E. Griffin, for the respondent.

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DAVIS, J. The third section of the act entitled "An act for the more effectual protection of the property of married women," passed April 7, 1848, as amended by chapter 375 of the laws of 1849, is as follows: "Any married female may take by inheritance or by gift, grant, devise or bequest, from any other person than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried; and the same shall not be subject to the disposal of her husband, nor be liable for his debts."

The farm on which the Goodwins resided was purchased with money belonging to Mrs. Goodwin, and was conveyed to her. She is therefore, by virtue of the act above cited, entitled to hold the same, and the rents, issues and profits thereof, "to her sole and separate use;" and may "convey and devise" the same, and any estate or interest therein, "with the like effect as if she were unmarried;" and in the enjoyment of these rights the law does, and the courts must, fully protect her.

It has long been settled in equity, that a married woman having a separate estate is, in respect to it, to be regarded as a *feme sole*, with power to dispose of it as though she were unmarried; and this rule was recognized and firmly established in this state by the late court of errors, in *Jacqués v. The Methodist Episcopal Church*, (17 John. 548,) where the cases upon the subject are cited and examined by Ch. J. Spencer and Platt, J., in opinions which, for their just appreciation of the true character of the marital relation, commend themselves to the careful study of courts and legislators. The same case establishes that when the disposition of her property is free and not the result of flattery, force or improper treatment, the wife may give it to her husband as well as any other person. With these established principles in mind we are prepared to examine the real question in this case, which is, what are the respective rights of husband and wife and of the creditors of the husband, (where the wife is the owner as her separate

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estate of a farm on which he and she reside with their family, and which is cultivated by the husband without any express agreement,) *in the crops* which are the fruits of her farm and his labor, and out of which the family are supported, and with which he is accustomed to exchange and traffic? To dispose of this question it is not necessary to determine whether the wife may or may not lease her farm to her husband for a term at a stipulated rent, or let it to him to be worked on shares, receiving a portion of the crops for its use. When those questions are presented, they are to be solved upon other principles than those involved in this inquiry.

In the present case the farm was cultivated by the husband, without any agreement except such as is to be implied from the circumstances of the case. While the acts of 1848 and 1849 have the force that is above conceded, it is well settled by authority, and is quite clear upon principle, that the marital rights of the husband in other respects remain unaffected. He is still entitled to the society and services of his wife and family. (*Freeman v. Orser*, 5 *Duer*, 477. *Switzer v. Valentine*, 10 *How. Pr. R.* 109. *Lovett v. Robinson*, 7 *id.* 105. *Coon v. Brook*, 21 *Barb.* 546.) And perhaps it will not be doubted that he and his creditors are entitled to the results of his own skill and labor. In raising crops upon a farm, the labor of the farmer and his servants enters into and probably constitutes the greater portion of their value. The produce is more the fruit of labor and skill, than the bounty of nature; and the adage, "he who sows ought to reap," is founded in good sense and sound economy. It is difficult to perceive upon what principle, in a case like the one before us, the mere title of the wife to the land should carry to her the title to the crops which are raised on it by the labor and skill of her husband, his family and herself, while he is occupying and cultivating the farm with her consent, and with no agreement constituting him and them her tenants. In other cases, if the owner of land consent, without any specific agreement, that another may enter into possession and occupy it and raise crops, the relation

is that of landlord and tenant; and the latter is entitled to the crops and to emblements on the termination of his possession. (*Stewart v. Doughty*, 9 *John*. 108.) If Mrs. Goodwin were in fact "an unmarried female," (as the law regards her in respect to this farm,) and had tacitly consented to the possession and cultivation of the land by Goodwin for several years, her remedy against him would not be in demanding the crops and suing him for their conversion, but in an action for the value of the use and occupation; and surely her relation to him as wife does not confer greater rights than she would have as a feme sole, all pretense of undue influence or compulsion being out of the question. Under the act of 1849, her power to dispose of the use and occupation is complete; and that she may confer them upon her husband under the well settled rules of equity, is not to be disputed. The acts of 1848 and 1849 have not changed the law in respect to the separate estate of a married woman, *as it existed in equity*, except, perhaps, so far as to obviate the necessity of a trustee in any case, and to confer on her greater powers of disposition. Regarding her separate property as though she were an "unmarried female," we should apply to it now the established principles of equity as they have been hitherto settled and applied in such cases. We have already seen that it is the established law of this state, that the wife may give, under proper circumstances, her separate property to her husband; (17 *John. ubi sup.*;) and it remains to be seen under what circumstances she will be regarded as having given it, or its rents, issues and profits to him. "The rule," says Mr. Clancy, "which may be extracted from the decisions, seems to be this: that if the husband receive the rents or the interest of his wife's separate property without her knowledge, then his executors shall be liable to account and refund; but if he receives them with her privity and without any express dissent, that then his executors shall not be liable to any account, as it shall be construed to be a gift from the wife." * * * "It appears also from these cases, that where the husband is per-

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mitted to receive the produce of his wife's separate estate, or where the wife and husband live together during the time that he is so receiving it, no account whatever will be directed. There are however several other cases which have held that an account would be given under such circumstances for one year's income." (*Clancy's Rights of Married Women*, 354.)

The cases from which these rules are extracted by the learned author are *Powell v. Hanky*, (2 P. Wms. 82;) *Christmas v. Christmas*, (*Sel. Cases in Ch.* 2; 2 Eq. Cases Abr. 152;) *Dalbiac v. Dalbiac*, (16 Ves. 116;) *Squire v. Dean*, (4 Br. C. C. 326;) *Townshend v. Windham*, (2 Ves. sen. 1;) and it cannot be questioned but that they fully sustain the rules. In *Powell v. Hanky*, the husband had received the interest on certain bonds and mortgages settled to the separate use of the wife, without any express authority from her but with her knowledge, though without either acquiescence or objection; and she was held not entitled to an account. In *Christmas v. Christmas*, the husband and wife were living amicably together while he was in the receipt of the produce of her separate estate, and this fact was considered as furnishing sufficient ground to infer that such receipt was with the wife's assent. In *Squire v. Dean*, the husband had applied the dividends of the wife's separate estate to the general purposes of his family, of which she was a member, and the chancellor refused to give her representatives an account against his estate; and in *Dalbiac v. Dalbiac*, Sir William Grant refused an account to the wife because she had lived with the husband, and had the benefit of her income while he was in the receipt of it.

In *Roper on Husband and Wife*, pp. 220, 221, the rule is thus stated: "Since the wife may appoint and dispose of her separate property, so she may give it to, or permit her husband to receive it, which will preclude her right, after his death, to charge his estate with what he so received. * * *

It cannot escape the observation of the reader, that the principle which pervades the cases on this subject is either express gift by the wife to the husband, or an implied gift to him

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(where it can be raised) of her separate estate, resulting from cohabitation and her acquiescence." "Thus, if the wife expressly or impliedly authorize her husband to receive the interest or rents of her general separate property during his life, this being a gift, there can be no reason to give her any part of them which accrued during his life."

The cases cited by this author are *Smith v. Camelford*, (2 Ves. jun. 698, 716;) *Milnes v. Busk*, (*Id.* 488;) *Pawlet v. Delaval*, (2 Ves. sen. 663;) *Whistler v. Newman*, (4 Ves. 146;) and several of the cases cited by *Clancy*, and above referred to. It would not be useful to state these cases here in greater detail. The doctrine which they establish is well stated by the authors cited, and it seems to be well founded in reason and principle. It establishes the power of the wife to confer on her husband the use or income of her separate property as a gift, and that her acquiescence or assent to its receipt or use by him is evidence of a gift by her. The statutes declaring her a feme sole as to such property certainly cannot have diminished her power over it.

It would seem that this doctrine should apply with its greatest force to a case like that at bar. Mrs. Goodwin had a clear right to "the rents, issues and profits" of her farm for her "sole and separate use," had she chosen so to keep them. She had also a clear right to give them to her husband. In accompanying him into the possession of the farm and occupying it with him and their family, and permitting him, without any agreement or arrangement as to the rents or produce, to cultivate it and to use the proceeds in the support of herself and family, and to sell, exchange and deal with the crops at his pleasure, she has conferred on him rights which cannot be withdrawn or repudiated when his creditors seek to collect their demands out of property for which he has exchanged the produce of the farm. Both at law and in equity it is his, and not her's. Any other rule would invert the relation of husband and wife. It would reduce the former to the condition of a servant of the latter, dwindling him to a *mere serf on her*

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lands, whose time and services and all his faculties are the property of his wife. It would open a door for the grossest frauds, by making the wife, in defiance of the husband's creditors, the absorbent of all his earnings with which to increase her wealth, while doling out to her *humble partner* barely enough of *her goods and provisions* for his board and clothing.

With these views we are of opinion that the learned justice erred at the circuit, in his charge and refusal to charge as requested, and that the judgment must be reversed and a new trial ordered.

GREENE, J., and MARVIN, J., concurred.

GROVER, J., dissented.

Judgment reversed.

[ERIE GENERAL TERM, February 14, 1859. *Grover, Greene, Marvin and Davis*, Justices.]

JOHN R. MILLER vs. WILLIAM FOLEY.

Where a warrant, issued by a justice of the peace, recited a complaint against *John R. Miller*, for a felony, and commanded the officer to arrest "the *said William Miller*;" *Held* that the warrant afforded no justification to the officer for the arrest of *John R.*; although it was proved that he was the person intended.

THIS was an action for false imprisonment, tried at the Onondaga circuit, before MULLIN, J. The defendant justified as a constable, and under a warrant issued by a justice of the peace reciting a complaint for a felony against *John R. Miller*, and commanding the officer to arrest "the *said William Miller*." The judge at the circuit, upon proof that the plaintiff was the person intended, held the warrant a justification to the officer and nonsuited the plaintiff; who appealed to the general term.

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J. W. Loomis, for the appellant.

Mr. Wallace, for the respondent.

By the Court, W. F. ALLEN, J. We held in *Graff v. Mulin*, (April, 1856,) following the current of authority, that process for the arrest of an individual must so describe the person intended that the officer would know who to arrest, and the party whose liberty was threatened might know whether he was bound to submit; and that it was not sufficient that the person in fact intended was arrested. In that case the initial, only, of the christian name of the party was given in the warrant. This is the rule, as well in civil as in criminal cases. (*Griswold v. Sedgwick*, 6 Cowen, 456; *S. C.* 1 Wend. 126. *Scott v. Ely*, 4 *id.* 555. 1 *Russ. on Crimes*, 619. *Hoye v. Bush*, 1 *M. & Gr.* 775.) The recital in the warrant, of a complaint against the plaintiff, cannot aid the defendant. At best it left it doubtful which was the true name of the party to be arrested. A party cannot have two christian names. (*Rex v. Newman*, 1 *Ld. Ray.* 562.) It left something to be spelt out from the whole warrant. Had the name of the party intended by the warrant and actually arrested chanced to be William instead of John R., the statement of the name in the recital might with some plausibility have been claimed to be a surplusage. The mandatory part of the warrant is that which gives it efficacy as a process, and under that the officer must justify. The recital of the complaint against the plaintiff is very high evidence that he was the individual intended to be designated by the name of William, in the warrant of arrest proper. But that is not sufficient. In *Scott v. Ely*, (*supra*,) there was no doubt that the right person was arrested. The recital in this case is no more conclusive than was the evidence in that case, and still the arrest was held unlawful. In *Hoye v. Brush* there was just as little doubt that the plaintiff was the individual intended, and yet the officer was held liable for the arrest. In *Griswold v. Sedgwick*, the evidence that the

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plaintiff was the party intended to be arrested was record evidence and was recited in the process. In other words, upon the face of the process it appeared that the plaintiff was the party in contempt, and yet as in the process itself—that is, the clause commanding the arrest—he was misnamed in respect to his christian name, all concerned in the arrest were held liable for the false imprisonment. The process recited that on the 21st day of February, 1824, by an order made in the circuit court by William P. Van Ness, one of the judges of that court, in a cause then pending between *Daniel S. Griswold*, (the plaintiff,) complainant, and Hill, defendant, it was ordered that Griswold pay to the clerk of that court \$1200 in ten days after notice of the order, and that the said *Samuel S. Griswold* had neglected to comply with the order, though more than ten days had elapsed, and commanded the marshal to take the said *Samuel S. Griswold*," &c. The process recited an order upon *Daniel S. Griswold*, and commanded the officer to arrest the said *Samuel S. Griswold*. Here the process recites a complaint against *John R. Miller*, and commands the officer to arrest the said *William Miller*. The cases are not distinguishable. Had the defendant proved that a felony had been committed, and that there was reasonable cause to suspect the plaintiff of the crime, he might have justified without the warrant; but that case was not made, by the answer or the evidence.

The judgment must be reversed, and a new trial granted; costs to abide the event.

[ONONDAGA GENERAL TERM, April 5, 1859. *Pratt, Bacon, W. F. Allen and Mullin*, Justices.]

CATHARINE VALLANCE, *appellant*, vs. JACOB BAUSCH,
respondent.

In giving construction and effect to the statutes of 1848 and 1849 as to the personal estate of married women, the common law or statutory right of the husband when those acts were passed, even to the choses in action of the wife not reduced into possession in her lifetime, should be considered as one of his marital rights, commencing with the marriage, continuing in him during their joint lives, and surviving on her death.

And courts are to presume that the legislature passed those acts with a knowledge of the husband's common law rights; and that those rights were not intended to be taken away, any further than was necessary to secure to married women, as against their husbands, the free, sole, separate use and enjoyment and absolute disposition of their property.

It was not the intention of the legislature to abolish, or change prospectively, the husband's right of succession to his wife's undisposed of personalty.

Where a married woman, who was the owner of certain personal property, made her will, in 1856, and died in 1857, leaving no children, but leaving her husband, and her mother, her surviving; *Held* that her mother had no right to attend as her next of kin, at the probate of the will, and file objections thereto, or be heard in the premises; she having no interest in, or right to, the goods, chattels and credits whereof the testatrix died the owner and in possession; but that the same belonged, after due administration, to the husband who offered the will for probate.

APPEAL from a decree of the surrogate of New York.

John W. Edmonds, for the appellant.

R. M. Harrington, for the respondent.

By the Court, SUTHERLAND, J. This is an appeal from the decree of the surrogate of New York, admitting to probate the will of Catharine E. Bausch, the wife of the respondent.

The testatrix was the owner of certain personal property, and, during coverture, made her will, bequeathing the same, bearing date December 1, 1856. She died on the 27th of March, 1857, leaving no children, but leaving her husband, the respondent, and the appellant, her mother, her surviving. The appellant attended, as her next of kin, at the probate, and filed objections thereto, and prayed to have said objections

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heard; but the surrogate decided that she could not be heard in the premises, and had no interest, right or title in or to the goods, chattels and credits, whereof the said Catharine died the owner, and in possession; but that the same belonged, after due administration, to the respondent, who proposed the will, as her husband; and, therefore, that the appellant had no interest in the matter of the probate of the will. It does not expressly appear, but it is presumed, that the marriage took place subsequent to the acts of 1848 and 1849, for the more effectual protection of the property of married women; or, if it took place before those acts, that the property of the wife was acquired by her subsequently, so that she had, as a married woman, all the rights in and over the property intended to be given or secured to married women by those acts, irrespective of any constitutional question, or of any vested right of the husband.

The question then is, to whom does the personal property of a married woman, continued in her or acquired and held by her as a married woman under the protection of those acts, go on her death, without having made any disposition thereof by will or otherwise, the husband surviving? Does the husband succeed and take it absolutely, or does it go to her next of kin? The surrogate held in this case, as he did in *McCosker v. Golden*, (1 *Brad.* 64,) that the statutes of 1848 and 1849 had not in such case made any alteration in the distribution or right of succession; that the property passed to the surviving husband absolutely, subject to the payment of the wife's debts, founding his right to the property on his sole right, if otherwise competent, to administer on her estate. The learned and able brief submitted by the counsel for the appellant in this case is mainly intended to show that the husband's right to the personal estate of his wife, dying intestate, was not, prior to the acts of 1848 and 1849, an incident merely of his administration or right of administration on her estate, but a right as husband, incident to or arising from the marriage relation, existing and continuing in him in the lifetime of the

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wife, and as such that it would be inconsistent with the object and provisions of the acts of 1848 and 1849, and with the sole and separate rights and interests intended to be given and secured to married women in and over their property by those acts, and therefore was abrogated by those acts.

It must be conceded, I think, that, if since the acts of 1848 and 1849, the husband is entitled to the undisposed of personalty of his wife on her death, he takes it as husband, and not as administrator. His right of administration is positive and certain by statute, and it may be necessary for him to administer on her estate in order to recover by action or to reduce into his possession her choses in action or chattels in the possession of third persons; but it is presumed that a voluntary payment to him and discharge by him of a bond or note belonging to the wife's estate, without or before administration, would be perfectly good. Who could object? It may be admitted that this right to her personalty would follow from his certain and positive right of administration, and from the exception from the statute of distributions of his wife's estate, and the absence of any accountability or liability on his part as administrator or otherwise, except for the debts of his wife; and yet, why was he excepted from the statutes of distribution, except as husband? and why his certain and positive right of administration, if otherwise competent, except as husband? and why, if any other person administered, or the husband died without having fully administered, and administration *de bonis non* was granted to a third person, was such other administrator, both at common law and by statute, a mere trustee for the husband or his representatives? (2 *Kent's Com.* 136. 3 *R. S.* 5th ed. § 30.) The language of the statutes, in excepting the estates of married women from distribution, is, that "their husbands may demand, recover and enjoy the same *as they are entitled by the rules of the common law.*" (3 *R. S.* 5th ed. § 86.) It is said in the books that the husband is entitled to administer for his own benefit as husband, and that he is entitled for his own benefit to all his wife's chattels real, things

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in action, and every species of personal property, whether reduced to possession or contingent, or recoverable only by suit. (2 *Kent*, 135. *Butler's note* 304 to *Lib. 3 Co. Litt.*) But he could not take, as administrator of his wife, that which he was absolutely entitled to in the lifetime of his wife; and at the common law, by the marriage he became absolutely entitled to all her goods and chattels then in her possession, or which came into her possession after the marriage, and to such of her choses in action as he should reduce into his possession during her life. I think in giving construction and effect to the statutes of 1848 and 1849, as to the personal estate of married women, the common law or statutory right of the husband, when those acts were passed, even to the choses in action of the wife, not reduced into possession in her lifetime, should be considered as one of his marital rights, commencing with the marriage, continuing in him during their joint lives, and surviving on her death. Indeed, it has been recently expressly held by the court of appeals, in the case of *Westervelt v. Gregg*, (2 *Kernan*, 202,) that the husband, in the lifetime of the wife, had a 'vested property or interest in his wife's choses in action, not reduced into possession, which the statutes of 1848 and 1849 could not constitutionally take away. If the right of the husband to reduce the wife's choses in action into his possession in her lifetime, or after her death in case he survived her, was property and a vested right or interest in the husband in the lifetime of the wife, certainly her death could not divest it, the right to reduce her choses in action into his possession absolutely and for his own benefit remaining in him after her death, as fully and completely as before. When the acts of 1848 and 1849 were passed, the husband took and had by the marriage, absolutely as his own, not only the goods and chattels of his wife in her possession, and also a right during their joint lives to reduce her choses in action into possession for his own benefit, by action or otherwise; but he also took and had by the marriage, and held during their joint lives, a right after her death, if he survived her, at common law and

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by statute, as her administrator or otherwise, to take and hold, reduce into his possession and recover absolutely for his own use and benefit, subject to the payment of her debts, all of her chattels, personal estate, and choses in action which he had not reduced into his possession in her lifetime, or which had not become his absolutely, prior to her death, by being by her reduced into her possession. Now, the right of the husband, after the death of the wife, to take, reduce into his possession and keep as his own, her choses in action and personalty after paying her debts, being in the lifetime of the wife just as positive and certain as his right to reduce her choses in action into his possession in her lifetime, if the one flowed from the marriage and was a vested right in the husband in the lifetime of the wife, the other also flowed from the marriage, and was a vested right in the husband in the lifetime of the wife. The exercise of either right depended, of course, upon the life of the husband—both rights were liable to be defeated by his dying before his wife; but if he lived or survived his wife, both rights were fixed and certain; and I do not see how the court of appeals could have held otherwise than they did in *Westervelt v. Gregg*, that the right of the husband in and over the choses in action of his wife, when the acts of 1848 and 1849 were passed, was a vested right. Certainly its liability to be defeated by the death of the husband did not make it contingent, or prevent it from being vested; otherwise, every expectant estate or right of possession, to be exercised, or to take effect in possession in the lifetime or on the death of another, would be contingent; as the remainderman or holder of such right of possession might die before he exercised the right, or before the person on whose death his expectant estate or interest was to take effect in possession. (2 *Cruise's Dig.* 270. *Fearne, Con. Rem.* 216, 7th ed. 2 *Ves. jun.* 357.)

As the law was when the acts of 1848 and 1849 took effect, the husband by the marriage took a certain and positive right to all his wife's choses in action, liable to be defeated only by

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his death, before he had exercised the right and reduced them into his possession, leaving her surviving. As to his right to her choses in action as her survivor, his right of administration on her estate was positive and certain by statute if not at common law ; it might have been necessary for him to administer to enforce her rights of action ; but if he did administer, his letters of administration were only evidence of his common law right and title and beneficial interest as husband. As to the goods, chattels and personalty of the wife in her possession at the time of the marriage, or which came into her possession afterward during the marriage, there is not a colorable reason for saying that on her death he took them as her administrator, or as an incident merely of his right of administration, for they must have absolutely vested in him as his own, as husband, in her lifetime.

It does not appear, either in this case or the case of *McCosker v. Golden*, (1 *Bradf.* 64,) whether the personalty of the testatrix consisted wholly or in part of goods, chattels and property actually in her use and possession in her lifetime, or of choses in action, rights and credits which she had never reduced to her possession. I think, therefore, that in this case the appellant has a right to take the position, that if since the acts of 1848 and 1849, on the death of the wife without having disposed of her personalty by will or otherwise, the husband is entitled to it absolutely as his own, subject to the payment of her debts, he is so entitled to it, as before those acts, as husband, and as an incident of the marriage or flowing from it, and not merely as an incident of his administration, or rights of administration on her estate. But giving the appellant the benefit of this position, does it follow that this right of the husband would be inconsistent with the rights intended by the acts to be given and secured to married women in and over their property, so that it must be presumed this right of the husband was intended to be abrogated thereby? I think not. After the most careful analysis of words and principles bearing on this question, I can see no such in-

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consistency. The act of 1848 is entitled "An act for the more effectual protection of the rights of married women," and that act and the act of 1849 amending it, were intended to give, and do give to a married woman the separate use and absolute disposition of her property, real and personal, by will or otherwise, as if she were a *feme sole*. She may use and enjoy it, and dispose of it as freely and as absolutely and exclusively, as she could had she continued single; but she is nevertheless a married woman, and must dispose of it as a married woman; and admit that her husband, on her death, succeeds to her undisposed of personal property, as husband and not as administrator; *his* right of succession *as husband*, would no more interfere with her rights in and over the property in her lifetime, than would the succession of her mother or child as *next of kin*. The right of succession is not a right, but an incident of property, given to it by law. The inheritable quality or incident of real estate, *as to its possessor*, may be the measure of the quantity of his estate or interest, but it cannot be called *his* right, but rather the right of his heirs. What other or further right of property is there or can there be, than the right of its free and exclusive use and enjoyment during life, with a right of free and absolute disposition? These rights the married woman can take, and has under the acts as to her personalty, without interfering with the right of succession of her husband. His right of succession may be a marital right, and *vest* in him by the marriage, but it vests *subject* to these rights of the wife, and thus can never interfere with them.

There cannot be two antagonistic rights of possession and enjoyment in different persons in the same property at the same time; and therefore the acts of 1848 and 1849 have abrogated the husband's common law right to the use, rents and profits of his wife's real estate during their joint lives, and also his common law right to the disposition of her personalty during their joint lives; but there might be a hundred successive estates in remainder, existing in different persons at the same time, and vested too, limited upon an estate for life in possession,

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without at all interfering with the estate, right of possession, and enjoyment of the grantee or holder of the life estate ; and if you give to the grantee or holder of the life estate in possession, an absolute right or power of disposition of the property, this does not prevent the estate of the remainderman from being technically vested, subject to such right and power of disposition, although it may infinitely diminish the probability and value of the remainderman's expectant future right of possession. The remainder would be vested, if the remainderman was a person ascertained, and in being, and capable of taking in possession immediately on the termination of the estate for life in possession, without the holder of the estate for life having exercised his absolute power of disposition. Before the revised statutes, a general devise of real estate, without specifying any particular estate, with an absolute power of disposition annexed, gave a fee ; but a devise for life in express terms with a like power of disposition, gave only a life estate. (*Jackson v. Robins*, 16 *John*. 538.) The article of the revised statutes as to "powers," permits future estates to be limited on a particular estate for life or years with absolute power of disposition, except as against purchasers and creditors ; and when there is no limitation of a remainder on such particular estate of the grantee of the power, it declares that he shall be entitled to an absolute fee. Before the revised statutes there could be a limitation of personal goods, chattels and money, by way of remainder or executory devise after a bequest for life. (*Hyde v. Parratt*, 1 *P. Wms.* 1. *Tissen v. Tissen*, *Id.* 500. *Westcott v. Cady*, 5 *John. Ch.* 335. *Moffat v. Strong*, 10 *John.* 12.) But a grant or bequest of goods and chattels for life, with an absolute power of disposition, made the gift as to the first taker absolute, and any ulterior limitation over void. (*Fearne's Exec. Dev. Powell's ed.* 167, 226, *n. Arguments of counsel in Jackson v. Robins*, 16 *John.* 537.) Yet, if a husband by marriage articles, or post-nuptial agreement, gave his wife her goods and chattels, or the use of her goods and chattels for life, with absolute power of disposition,

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there is no doubt, in case of her death without having disposed of them, that the husband would have taken them as his own, by virtue of his original right and title as husband. (*See the cases cited by Mr. Bradford in McCosker v. Golden*, 1 *Brad.* 64, *above cited*, and *Moehring v. Mitchell*, 1 *Barb. Ch.* 271; *Strong v. Wilkin*, *Id.* 9.)

No doubt the rights of the husband to his wife's personalty and in her real estate, which he acquired by marriage, and by marriage and the birth of issue, as *tenant by the curtesy*, being rights given him by law, he could waive or release them absolutely, either by ante or post-nuptial agreement; but the point is, that if the instrument went no further than to release and give to the wife her goods and chattels, or the sole and separate use of her goods and chattels, or of her real estate, for her life, with an absolute power of disposition, his right of succession to the goods and chattels, and his right as tenant by the curtesy in her real estate, would have remained in him as husband, on her death, without having disposed of them. *The presumption would have been, that he made the agreement in favor of his wife with a knowledge of his legal rights as husband, and that he did not intend to release them any further than the express words of the instrument and the specific rights and power thereby given to his wife required.* Precisely so, in construing these acts of 1848 and 1849, we are to presume that the legislature passed them with the knowledge of the husband's common law rights, and that these rights were not intended to be taken away, any further than was necessary to secure to married women, as against their husbands, the free, sole, separate use and enjoyment, and absolute disposition of their property. These are all the *beneficial* rights of property that could be conferred on them, or secured to them. An alteration by the statutes, of the legal right of succession, or of the legal disposition of their property on their death, without having disposed of it by will or otherwise, would have been, unnecessarily for the declared purposes of the acts, taking rights from the husband, and conferring them, not

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on his wife, but on others. What principle of public policy or political economy would have induced the legislature to take away the husband's right of succession to his wife's undisposed of personalty and give it to her next of kin, after securing to the wife during her life all the beneficial rights she ever had or could have as a *feme sole* in or over it? If the force and direction of one's affections while living should direct the legal disposition of property after death, I should not like to believe that a majority of married women would ask for the construction of these acts insisted on by the appellant. No doubt it was competent for the legislature to abolish or change prospectively the right of succession of the husband to his wife's undisposed of personalty, and his right as tenant by the curtesy in her undisposed of realty in which she had an estate of inheritance; but I think the legislature intended to take away neither right by these acts, notwithstanding the able opinion of Mr. Justice Potter on the latter point, in *Billings v. Baker*, (15 *How. Pr. R.* 525.)

I express here an opinion on this question, whether the right or estate of tenant by the curtesy has survived the acts of 1848 and 1849, because the opinion of Judge Potter in the case last cited was particularly cited and insisted on, on the argument of this case; and because I admit, after conceding to the appellant her position in this case, that the husband's right to his wife's undisposed of personalty on her death, if he has any since the acts, is a right as husband existing initiate in the lifetime of the wife, and which has survived the acts; that the reasons above stated to show that such right is not inconsistent with the acts, in the main, apply equally to the question of the husband's right or estate as tenant by the curtesy. Of course both questions are mere questions of intention—how far the acts were intended to operate. If these rights of the husband have been taken away by the acts, it is done by implication. In *Bowen v. Lease*, (5 *Hill*, 226,) the court say: "As laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject,

it is but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable. Hence a repeal by implication is not favored," &c. (See also *McCartee v. The Orphan Asylum Society*, 9 Cowen, 437, 506.)

Much stress has been put on the words, "and shall continue her sole and separate property, as if she were a single female," and the words, "but shall be her sole and separate property, as if she were a single female," &c. in the 1st and 2d sections of the act of 1848; and on the words, "and the same shall not be subject to the disposal of her husband, nor *be liable for his debts*," in the first section of the act of 1849, as showing these acts to be irreconcilable with the continuance of the rights of the husband in question. As to the words above quoted from the act of 1848, taken literally, they are simply absurd, and would involve a legislative impossibility.

The property of a single female cannot literally *continue* in her after marriage as if she were a single female. The act of 1848 was intended to secure to a married woman the sole and separate *use* of her property as if she was single, and from the peculiar phraseology above quoted, was probably intended to give her, and probably would have given her, a right to dispose of it otherwise than of her personalty by will, as if she were single; but the act of 1848, probably did not remove the disability placed on married women by the revised statutes, of disposing of their personalty by will; (*Wadhams v. The Am. Home Missionary Society*, 2 Kern. 415;) nor have both acts removed the disability of coverture as to her property, so that she can bind herself personally as a *feme sole* by her contracts, and thus *at law* lead to an involuntary alienation of her property by judgment and execution. (*Yale v. Dederer*, recently decided by the Court of Appeals, not yet reported.)

These acts have not therefore in all respects removed the disability of coverture as to the property of married women. They have removed it, so far as it was for their benefit, and

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no further. Before the personalty of married women dying intestate can go to their next of kin, the exception of their estates from the statute of distribution must be repealed—who can say that the acts of 1848 and 1849 imply such repeal, or that such repeal would be for *their* benefit? So as to the phraseology of the act of 1849, “and the same shall not be subject to the disposal of her husband, or liable for his debts;” the act was intended to protect the property of the wife against the husband and his debts, in her lifetime. Of what consequence is it to her whether the property is sold for the debts of her husband, or of her next of kin, after his death?

For these reasons, which have been stated much more at large than I intended before I looked into the cases bearing on the construction of these acts, I am of the opinion that the decree of the surrogate in this case should be affirmed, with costs.

[NEW YORK GENERAL TERM, May 16, 1859. *Davies, Clerke and Sutherland, Justices.*]

THE EPISCOPAL CHURCH OF ST. PETER in the town of Westchester *vs.* WILLIAM VARIAN and others.

The code not prescribing any particular form for the undertaking to be given, under section 222, by a plaintiff upon obtaining an injunction, a penal bond with sureties, to the effect that the plaintiff will pay such damages, not exceeding the amount specified, as the defendants may sustain by reason of the injunction, is a substantial compliance with the requirements of § 222.

Where such a bond declares that the three obligors are, and that each of them is, bound to the obligee, the obligation is joint and several.

Where, in the body of a bond, the obligors were described to be “the corporation the trustees of the town of Westchester, E. H. and R. G. P.” and the condition was that “the above bounden” would pay &c. upon a breach; and the conclusion was that “in witness whereof the parties hereunto have set their hands and seals;” and it was signed by “W. V., President of the Board of Trustees; E. H. and R. G. P.,” *it was held* that “the above bounden” meant the trustees of the town of W. and E. H. and R. G. P., and that W. V. was not personally liable, upon the bond.

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One who executes a contract as the agent of another, without authority, is himself primarily responsible as a contracting party. But in order to fix and enforce this personal liability, it must appear that the party sought to be charged signed as agent—that is, professed to act for another—and that such act was without authority.

Where a corporation having authority to sue and be sued, commences an action, in pursuance of a resolution of the board of trustees, and its president, for the purpose of obtaining an injunction therein, executes the undertaking required by section 222 of the code, in his official character—not professing to act as the agent of the corporation—the instrument will be regarded as the act of the corporation itself, and not the act of the president as its agent; and the officer will not be bound thereby.

APPEAL from a judgment entered upon the report of a referee. The complaint alleged that on or about the 9th day of July, 1852, the defendants William Varian and Elnathan Hawkins, and Robert G. Palmer, late deceased, made a certain bond, signed with their seals, and acknowledged the same before a justice of the peace, which was in the words and figures following: “Know all men by these presents, that the corporation, the ‘trustees of the town of Westchester,’ Elnathan Hawkins and Robert G. Palmer, and each of them and their heirs, executors, administrators and assigns, are held and firmly bound unto the corporation, the Episcopal Church of St. Peter, in the township of Westchester, in the sum of two thousand dollars, lawful money of the United States of America. Whereas the trustees of the town of Westchester have commenced an action in the supreme court of the state of New York against the Episcopal Church of St. Peter, in the township of Westchester; and whereas the said trustees have applied to the court for an injunction to restrain the said church and its agents from doing or continuing to do certain acts of which the said trustees have complained in the complaint in this action: Now, therefore, the condition of this obligation is such, that the above bounden will, if the injunction applied for as aforesaid shall be granted, pay unto the defendants such damages as they may sustain by reason thereof, together with the costs which may be adjudged to the defendants, if it shall finally be decreed that the said plaintiffs

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were not entitled to the said injunction. And if it shall be adjudged that the said plaintiffs were and are entitled to said injunction, then these presents to be null and void, otherwise to remain in full force and effect. In witness whereof, the parties hereunto have set their hands and seals.

WILLIAM VARIAN, [L. s.]
President of the Board of Trustees.

E. HAWKINS. [L. s.]

R. G. PALMER. [L. s.]”

The plaintiffs averred that the defendant William Varian executed the said bond individually, the trustees of the town of Westchester not having any authority in law to execute such a bond, or to authorize the execution of such a bond, for any purpose whatever. And that Robert G. Palmer died, before the commencement of this suit, intestate, and that letters of administration upon his estate were duly granted by the surrogate of the county of Westchester to the defendant James H. Palmer. That the said bond was approved by Seward Barculo, late one of the justices of this court, on the 12th day of July, 1852, and was filed in the clerk's office of Westchester county on the 19th day of July, 1852, and that the injunction referred to therein was granted on or about the 12th day of July, 1852, and remained in force until December 21, 1852, when the same was dissolved by this court, on the ground that the trustees of the town of Westchester were not entitled to the same. That the said trustees appealed from such decision to the general term of this court, and moved for a new trial, which motion for a new trial was denied by the said general term, and a judgment in favor of the plaintiffs against the said trustees was duly entered on the 29th day of May, 1853. And the plaintiffs further alleged, that by reason of said injunction having been laid, large damages were by them sustained, and that on the 8th day of November, 1854, an order was made by this court, referring it to John W. Mills, as sole referee, to ascertain the amount of said damages, and report the same to this court with all convenient speed; that said

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referee, after having been attended by the counsel of the respective parties, on the 23d day of February, 1855, made his report, by which it appeared that the damages suffered by the plaintiffs amounted to the sum of \$5081.50. The complaint further alleged that on the 12th day of March, 1855, an order of this court was made and entered, confirming the said report of the referee, and directing the clerk of this court to deliver up the aforesaid bond to the plaintiffs' attorneys to be prosecuted; whereby an action had accrued to the plaintiffs, against each of the defendants.

The defendant Varian, by his answer, admitted the execution of the bond by the corporation, the trustees of the town of Westchester; that he was one of the said trustees, and the president of the board. He denied that he executed the said bond individually, but insisted that in the execution of said bond he acted in his official capacity, as president of said corporation, and that the execution of said bond was the act of the corporation under its corporate seal, by the defendant as president thereof; and that the said corporation, the trustees of the town of Westchester, at the time of the execution of the bond, had authority in law to execute such a bond, for the purposes mentioned therein. And that if, by the law of the land, the said corporation had no right or power to make and execute the said bond, then the defendant would, upon the trial, insist that it was the intention to bind the said corporation by the said bond, and not the defendant individually, and that it was the duty of the plaintiffs to except to the said bond, before, or on, or after its approval by the said justice; and that, having omitted so to do, the plaintiffs were estopped from making any personal claim against the defendant upon, or by virtue of said bond.

The defendant Hawkins admitted the execution of the bond, by the corporation, and insisted that it had the right to execute the same; and alleged that he and Palmer executed the same as sureties, and not otherwise; and that if he, the defendant, was liable to the plaintiff upon the said bond, he was

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so liable only as one of the sureties thereon for the said corporation, and upon their proper and valid execution of said bond, and not otherwise.

For a further answer the defendant alleged, that the bond was made by him and Robert G. Palmer jointly with the corporation, which said corporation was still in being, and not by the defendant and Palmer alone, or with William Varian. And inasmuch as the said corporation, the trustees of the town of Westchester, were not made parties defendants, together with the defendant Hawkins and James H. Palmer, administrator of Robert G. Palmer, the defendant prayed judgment, and that the complaint be dismissed with costs.

The plaintiffs by their reply denied that the bond was made and executed by Hawkins and Palmer jointly with the corporation, and averred that it was made by the two persons last mentioned, with William Varian, and that therefore the trustees of the town of Westchester were not proper parties to the action.

The facts found by the referee, and his conclusions of law thereon, are stated in the opinion of the court. He reported in favor of the plaintiff for the sum of \$2000, the penalty of the bond, and judgment being entered at special term, for that sum, with costs, the defendants Varian and Hawkins appealed.

J. E. Develin, for the appellants.

G. W. Morris, for the respondents.

By the Court, BROWN, J. 1. The bond in question is a substantial compliance with the requirements of section 222 of the code. It was a written undertaking with sureties, "to the effect that the plaintiff [in that action] will pay such damages not exceeding the amount specified," as the defendants might sustain by reason of the injunction. It is under seal and takes the form of a penal bond. But as the code prescribes no particular form, it must be regarded as sufficient.

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2. In form it is joint and several. It declares that the three obligors, and each of them, are bound. This is equivalent to saying they are bound together and each of them is bound severally. Upon this view Elnathan Hawkins and the administrators of Robert G. Palmer are liable to the plaintiffs, and the judgment against them is correct.

3. The judgment affirms the personal liability of the defendant William Varian, and this is the principal question in the case. The legal effect of the bond is to be determined in part by an examination of its language, with a view to ascertain the intentions of the parties.

4. In the body of the instrument the obligors are described to be "the corporation, the trustees of the town of Westchester, Elnathan Hawkins and Robert G. Palmer." It is these three parties that are held and firmly bound to the "corporation, the Episcopal Church of St. Peter, in the township of Westchester." The condition declares that the above bounden will pay, &c. upon a breach of the condition. The phrase "the above bounden" means the trustees of the town of Westchester, Hawkins and Palmer. It has the conclusion, that in witness whereof the parties hereunto have set their hands and seals, and is signed and sealed by William Varian, president of the board of trustees, E. Hawkins, R. G. Palmer. There is not a word indicative of an intention to bind H. Varian personally. On the contrary, the intention to bind the trustees of the town of Westchester is as clear and manifest as language can make it. In *Townsend v. Corning*, (23 Wend. 435,) Baldwin the agent had signed his name to the instrument, "Harvey Baldwin," and affixed his seal in the usual manner. And Judge Bronson says, "Although he subscribed his name and affixed his seal, there are no words of contract on his part; and whether he intended to bind his principal or not, it is apparent from the whole instrument that he did not intend to contract, himself." He refers to *Cutlin v. Ware*, (9 Mass. Rep. 218.) We may then, I think, dismiss from our

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minds the idea that William Varian is personally bound by the terms of the instrument.

5. The referee by whom this action was tried finds the following facts, as appears by his report. 1st. That the trustees of the town of Westchester, the plaintiff in the action on which the injunction was issued and the bond executed and filed, were duly incorporated by the act of the legislature passed April 12, 1844, to incorporate the trustees of the town of Westchester. 2d. That at the time of the commencement of such action and the executing and filing of the bond, the defendant William Varian was the president of the board of trustees of the town of Westchester. 3d. That the said action was commenced and conducted against the Episcopal Church of St. Peter, under and by authority of a resolution of the board of trustees, of the date of the 5th July, 1853. The referee then finds as matter of law, that the execution of the bond by Varian, as such president, was without lawful authority, and as a consequence that he is personally chargeable as one of the obligors of the bond.

It admits of no dispute that he who executes a contract as the agent of another, without authority, is himself personally responsible as a contracting party to the contract. The principle is, that it is the contract of some one, and if not that of the principal, it must of necessity be that of the agent himself. (*Story on Agency*, 264, and the authorities referred to in note 1. *White and others v. Skinner*, 13 *John.* 307. *Meech v. Smith*, 7 *Wend.* 315.) In order to fix and enforce this personal liability, it must appear that the party sought to be charged signed as agent—that is, professed to act for another—and that such act was without authority. Now, it seems to me, that in the present case Varian did not act or profess to act as the agent of another. And that so far as he did act he was fully authorized by the board of trustees, or the corporation of which he was a manager. Amongst the incidents to corporate existence is the capacity to sue and be sued. The 5th section of the act of the 12th April, 1844, under which

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the trustees of the town of Westchester are incorporated, gives them the general powers and subjects them to the liabilities and restrictions imposed by the 18th chapter of the 1st part of the revised statutes. Among these are enumerated the power to sue and be sued, and to complain and defend, in any court of law or equity. It is evident, therefore, that the corporation had a right to institute the action in which the injunction was obtained and the bond given. The object of the action was to restrain the present plaintiffs from the removal of the remains of the dead from a burying ground in which the trustees of Westchester claimed to have an interest, and from erecting a church edifice thereon. The obtaining of an injunction and the giving of the usual undertaking were part of the ordinary process and proceedings in such an action, and the intention and authority to do both are to be implied from the resolution authorizing the commencement and prosecution of the action ; because the authority to do every thing necessary to the successful and effectual prosecution of the action is to be implied from such an act. It also appears from the complaint in this action, that the injunction thus obtained was dissolved at the special term of the supreme court, and thereupon the trustees appealed to the general term and moved for a new trial, which motion was also denied. Here was a distinct and emphatic recognition and ratification of whatever had been done by the president of the board of trustees in the prosecution of the action and in obtaining the injunction. If it be assumed that the defendant Varian's act in signing the bond was the act of an agent, it is impossible in the face of this evidence to say that it was done without authority. The trustees may have commenced an action which they could not maintain. They may have asserted rights which did not exist or which could only have been asserted by some other body or person. But this would not show that Mr. Varian was without authority to execute the bond in question.

I am of opinion, however, that the act in question was not the act of an agent, in the sense in which it must have been,

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to render the agent without authority personally liable. The defendant Varian did not sign as agent, or profess to act as the agent of the trustees. He was one of them himself, and their presiding officer, and what he did was done in that capacity, and under a resolution of the board of trustees, and not as their agent. His act was the act of the corporation itself. It could act in no other way. Its assent and signature to a bond or other instrument could only be given through its executive officers. Their act was its act, and the signature of Mr. Varian was put to the bond as the only means at its command by which it could bind itself. It was a defective execution, doubtless, because not made with the corporate seal. Defective as it was, it was still the act of the corporation itself, and so intended at the time. The directors or trustees and officers of a corporation are its agents, in a certain sense, because whatever they do is done for the corporation. But they are not its agents in the sense of one who acts under a power and authority delegated by a natural person. I have said a corporation can only act by and through its officers. In this way, only, can it hold communication and commerce with the rest of the world. And when its officers commence actions and sign their official names to instruments designed to be corporate acts for corporate purposes, in pursuance of resolutions of its directors or trustees, they must be regarded as its own acts and not the acts of persons exercising power and authority delegated by others. The referee therefore erred, I think, when he found as matter of law that the defendant William Varian acted without lawful authority.

The judgment as to the defendants Elnathan Hawkins and James Palmer, administrator, &c. should be affirmed. And as to the defendant William Varian it should be reversed and a new trial at the circuit granted, with costs to abide the event.

[KINGS GENERAL TERM. December 14, 1858. *S. B. Strong, Emott and Brown*, Justices.]

WATSON and wife *vs.* DONNELLY and LYNCH.

Where a testator has mind and memory to understand the situation and value of his property, and the condition and situation of those who by reason of their relationship to him have claims upon his bounty, in such case his will must stand for the reason of the act; and it is not sufficient to impeach his competency that the will is not such, in all respects, as might have been expected from one in his situation.

A British subject holding lands within the United States, and who, by the treaty of 1794 with Great Britain, was authorized to continue to hold them, and to grant, sell or devise the same *to whom he pleased*, in like manner as if he had been a native born citizen of the United States; and who was within the terms of the stipulation that neither those so holding lands, nor their heirs or assigns, should, so far as respected the said land, and the legal remedies incident thereto, be regarded as aliens, had the right to convey or devise the property to *aliens* as well as citizens.

The power to grant or devise to whomsoever the owner pleased necessarily implied a corresponding ability, on the part of the grantee or devisee, to *take and hold*.

The treaty, by the term "assigns" embraced, in its spirit, all who should succeed to the title of the original owner by any means other than by descent. And it conferred upon the devisee of such original owner, although an alien, all the rights which he could have had if he had become naturalized. Consequently such devisee could grant or devise the land to any one competent to take.

ACTION of ejectment, to recover an undivided interest in certain real estate situate in the town of Rome, tried before Justice PRATT and a jury, at the Oneida circuit. The plaintiffs claimed in right of the wife as heir at law of Dominick Lynch, deceased. The defendant claimed under a devise from Dominick Lynch to his wife Jane Lynch, and a devise from the latter to the defendant Louisa Lynch.

It was assumed by the judge, at the circuit, that Dominick Lynch and his wife were aliens, and came to this country to reside between 1783 and 1794. There was no proof that either were naturalized, and it was assumed by the judge that the wife never had been naturalized and never filed any declaration to enable her to take and hold real estate under any of the statutes of this state. Dominick Lynch acquired the title to the premises in 1786. On the 17th day of July, 1823, he

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made his will, by which he devised one-eighth part of his estate, after setting apart a portion of it for specific purposes, to his wife in fee simple. He died in 1825. In 1831 a decree in partition was made in the court of chancery, in an action in which the widow of Dominick Lynch and James Lynch his son and the father of the feme plaintiff in this action, by descent from whom she claims with others, were parties, by which the premises in question were allotted and set off to the widow Jane Lynch in pursuance of the devise. In 1843 Mrs. Jane Lynch made her will, which was after her death in 1849 admitted to probate, by which she devised all her estate, real and personal, to the defendant Louisa Lynch. The plaintiffs also claimed that the testatrix, Mrs. Lynch, was incompetent to make a will, and was also unduly influenced by the devisee, Louisa Lynch. The judge at the trial nonsuited the plaintiffs, who, upon a case, moved for a new trial.

T. Jenkins, for the plaintiffs.

H. A. Foster, for the defendants.

By the Court, W. F. ALLEN, J. Upon the questions relating to the incompetency of Mrs. Jane Lynch to make a will, and the undue influence exercised over her in the matter of her will, the judge, at the close of the trial, held that there was no sufficient evidence to show that the testatrix was of unsound mind at the time of making the will, or that undue influence was exerted over her which would render it void. He also refused to submit either question to the jury. While courts should be cautious on the subject of interfering with the province of a jury, yet when there is no evidence, or no evidence which would warrant a verdict for the plaintiff, it is the duty of the court to nonsuit. When a verdict for the plaintiff would be set aside as against evidence there is nothing to submit to the jury. (*Stuart v. Simpson*, 1 *Wend.* 376.) There is nothing in this case indicating any incapacity in the

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testatrix to make her will or do any other act calling for the exercise of judgment and discretion. She was advanced in years, and her bodily infirmities rendered it difficult for her to attend to all her domestic affairs and be about the house as she had been accustomed to do. And as it was not necessary for her to superintend in person all the details of her house-keeping, she very properly and very naturally devolved many of those cares and labors upon her daughter Louisa, living with her. Had she not done so it would have been very singular, under the circumstances, and without explanation would have been stronger evidence of senile imbecility than any which was adduced upon the trial. But the old lady never, and certainly not until within a very few months of her death, which took place six years after the making of the will, gave up the direction of her household and domestic affairs. She managed her own affairs as she pleased, making her own selection of a residence, and leasing her house, and employing such agents and instrumentalities as she thought best. The whole case shows that she had mind and memory to understand the situation and value of her property, and the condition and situation of those who by reason of their relationship to her had claims upon her bounty. In such case her will must stand for the reason of the act, and it is not sufficient to impeach her competency that the will is not such in all respects as we should have expected from one in her situation. It is possible that if we could be placed precisely as she was situated, and have knowledge of all the circumstances which operated upon her mind, we should see very satisfactory reasons for the disposal of her property in the manner provided for by the will. The circumstances relied upon to establish incompetency are very slight, and are entirely consistent with the possession of a disposing mind and memory. The failure to recognize a friend or relative at first view, on a few occasions, whether attributable to the position of the party in reference to the light, to imperfect vision, or a want of ready recollection at the instant, comes far short of proving imbe-

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cility. The collection of the toys and dolls, and their arrangement, before the christmas festival of 1843, is explained by the evidence as an effort to provide a treat and to give pleasure to her grand and great-grandchildren, who were accustomed to visit her at that season. They were not heard of as occupying her thoughts or her time after christmas of that year, or as being in her possession, and the collection was made during the fall of that year. There is an entire want of proof that any influence was exerted over her in the matter of her will, by any one. She communicated the fact of making the will, by letter to her son Jasper, not long after it was made. There were doubtless reasons connected with her own personal comfort, why the will was not published to her children and grandchildren in New York. Such instruments are not ordinarily made public before the death of the testator. Before the condition and circumstances of her kindred can be called in aid, as a circumstance tending to establish either incompetency or undue influence, there must be some independent evidence tending to show one or both, in impeachment of the will. Had the questions been submitted to the jury, and they had found for the plaintiffs upon either ground, the verdict would have been set aside as against evidence. (*Stewart v. Lispenard*, 26 *Wend.* 255. *Blanchard v. Nestle*, 3 *Denio*, 37. *Clarke v. Sawyer*, 2 *Comst.* 498.) Upon the plaintiffs' case the will was not impeached, and the testimony on the part of the defendants, to which reference will not be made in detail, establishes the competency of the testatrix, and that the instrument was in truth her will, and was not the result of undue influence over her. Age and bodily infirmities had affected her mental faculties much less than is usual in persons of her years. Her vigor of intellect was very little if at all impaired at the time of making the will.

The only questions of moment, in the case, are the capacity of the testatrix to take, under the will of her husband, and her power to devise the estate at her death.

It must be assumed, upon this motion, as it was by the

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judge at the trial, that Mrs. Jane Lynch was an alien, and the same evidence by which her alienage was shown established that of her husband. Neither were residents of the state before the treaty of peace of 1783, and neither became citizens of the United States by naturalization. But the right to hold real estate does not depend upon the citizenship or allegiance of the party. Aliens may be permitted to take real estate by descent or in any other way, and to hold and dispose of the same, by the municipal law of the state or under treaties made by the federal government with foreign states, which are a part of the supreme law of the land.

Dominick Lynch was, as is conceded, within the provisions of the 9th article of the treaty with Great Britain, of 1794. He was then a British subject holding lands within the United States, and was by that treaty authorized to continue to hold them, and to grant, sell or devise the same to whom he pleased, in like manner as if he had been a native born citizen of the United States; and he was within the terms of the stipulation that neither those so holding lands, nor their heirs or assigns should, so far as respected the said lands and the legal remedies incident thereto, be regarded as aliens. (8 *U. S. Stat. at Large*, 122.) State legislation could not affect or impair the rights secured by this treaty. The rights became vested at once, and were beyond the reach of state interference. (*Jackson v. Wright*, 4 *John.* 75. *McIlvaine v. Cox's Lessee*, 4 *Cranch*, 209. *Fairfax v. Hunter*, 7 *id.* 603. *Chirac v. Chirac*, 2 *Wheat.* 259.) This treaty was in force in 1825 when Dominick Lynch made his will. By the treaty he was authorized to devise the land to whom he pleased, and his heirs and assigns were in respect to the lands to be regarded as citizens, or rather were not to be regarded as aliens. The power to grant or devise to whomsoever the owner pleased, would necessarily imply corresponding ability of the grantee or devisee to take and hold; else the treaty would provide for a vain thing, to wit, a grant or devise, which would be fruitless. We cannot suppose this to have been the intention of the contracting

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states. The language when used as it was in respect to aliens, and to secure to them certain rights of property with the right of full and free disposal as if they were native citizens, gives the right to convey or devise the property to aliens as well as citizens. The expression "to whom they please" would have had no place in the treaty, if the design had been to restrict the power to grant and devise, to grants and devises to those who as citizens, and in their own right and irrespective of this stipulation, had power to take. Had the stipulation stopped there, the right of the alien owner to devise or grant to aliens would have been complete. But, as it were from more abundant caution, the clause is added that neither they, (the then owners,) nor their heirs or assigns, should be regarded as aliens in respect to said lands and the legal remainders incident thereto. The assigns of the then owner were to stand in the same situation as their grantors or assignors. Their alienage was to be ignored, and in respect to such lands they were to enjoy all the rights of native citizens. "Heirs and assigns" were used in the last clause of this section of the treaty as embracing all who could in any manner succeed to the title of the alien owner, dividing them into two classes in reference to the mode of acquiring title, to wit, those acquiring title by descent and by purchase, the latter class including devisees. Purchase, in its most enlarged sense, signifies the lawful acquisition of real estate by any means whatever except by descent. (2 *Bl. Com.* 241.) The term "assigns" is as comprehensive as that of purchaser, or "one taking by purchase." It means those to whom rights have been transmitted by particular title, such as sale, gift, legacy, transfer or cession. (*Bouv. Dict. "Assigns."* *Booth's case*, 5 *Co. Rep.* 77 *b.*) The treaty authorized the alien owner to "grant, sell and devise," and then gives to the "assigns" all the rights of citizens, in respect to said lands. A devisee is clearly within the intent of the provision and the equity of the treaty. The word "assigns" was technically inapplicable to grantees of real estate in fee simple, but it was a convenient term to use, embracing in its spirit all that suc-

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ceeded to the title by any means other than by descent. If this is the true construction of the treaty, it disposes of the case; for it conferred upon Mrs. Lynch, the devisee, all the rights, in regard to this real estate acquired under the will of her husband, which she could have had if she had become naturalized, and she could of course grant or devise it to any one competent to take; and the competency of her devisee, Louisa Lynch, is not disputed. Alien heirs take by descent the real estate of their ancestors who were British subjects at the time of the treaty of 1794, and the rights of heirs are no better secured than are those of grantees or devisees. They all stand upon the same footing. (*Shanks v. Dupont*, 3 *Peters*, 242.) The language of Chancellor Kent, in *Goodell v. Jackson*, (20 *John*. 707, 708,) is pertinent to this case. It would be a reproach to good sense as well as to the good faith of the government to suppose they intended any thing less than their words imported. To say that the owner may sell or devise to whom he pleases is not consistent with the claim that unless the grantee or devisee answers a certain description he shall not take. To say that alienage shall not be imputed to the assigns of the owner as affecting their title to the estate, or the legal remedies relating thereto, is not consistent with the claim that the estate cannot be conveyed to aliens, but must descend to those capable by the municipal law of the state to take by inheritance. *Bright's Lessee v. Rochester*, (7 *Wheat*. 535,) does not affect this case. There the ancestor came to this country after the treaty of 1783, and died before that of 1794, seised of the lands in suit. He could not at the time of his death transmit lands to his heirs, and the latter, therefore, under whom the plaintiff claimed, had not at the time of the signature of the treaty of 1794, any title upon which that treaty could operate. Had the alien ancestor devised the estate to the individual claiming as heir, the provisional title would have vested in him, and the treaty would have confirmed that title. *Jackson v. Wright*, (4 *John*. 75,) is only distinguished from this case by the fact that there the estate vested

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in alien heirs, and here in an alien devisee. Van Ness, justice, speaking of the treaty of 1794, says : " The intention of the contracting parties to that treaty was that the citizens and subjects of each should be quieted in the enjoyment of their estates, in the same manner as if they and their heirs had been native citizens." (*And see Jackson v. Adams*, 7 *Wend.* 367, and *Munro v. Merchant*, 26 *Barb.* 383.) The case of *The Duke of Cumberland v. Graves*, (3 *Seld.* 305,) is in principle decisive of this case. The plaintiff, an alien, claimed to hold land conveyed under the provisions of the act of April 2, 1798, the first section of which is as follows : " All and every conveyance or conveyances hereafter to be made or executed to any alien or aliens not being the subject or subjects of some sovereign state or power, which is or shall be at the time of such conveyance, at war with the United States of America, shall be deemed valid to vest the estate thereby granted in such alien or aliens ; and it shall and may be lawful to and for such alien or aliens to have and to hold the same to his, her or their heirs or assigns for ever, any plea of alienism to the contrary notwithstanding ;" with a proviso not pertinent to the question here. The Court of Appeals held that land conveyed to an alien pursuant to the provisions of that act might continue to be held by alien heirs and *alien devisees* of the grantee, until by inheritance, devise or grant the title came to a citizen. The plaintiff, an alien, claimed under a will of an alien, and his title was held valid ; and the word " assigns," in the act, was the only word under which a devisee could claim. The opinion of Judge Ruggles is entirely applicable to, and decisive of, the question made upon this branch of the case, as to the right of Mrs. Lynch to take as devisee and in turn to devise to her daughter. This being the effect of the treaty of 1794, and the right of alien owners to devise to aliens being guarantied by it, the act of 1825 could not divest them of that right, or deprive the alien devisee of the right to take and hold the estate. The treaty is the paramount law of the land ; and even if it were abrogated by the original contracting parties, the

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vested rights of citizens, under it, would remain. (*Const. of U. S. art. 6, § 2. Lessees of Gordon v. Kerr, 1 Wash. C. C. R. 323. Hare v. Hylton, 3 Dall. 236. Denn v. Fisher, 1 Paine's C. C. R. 54. 8 Wheat. 494.*) It is not necessary then to consider the effect of the act of 1825 upon the devise of Dominick Lynch, or determine whether it destroys the common law rule by which an alien purchaser or devisee could hold the estate purchased or devised, as against all but the government; by which he could take the estate, although not for his own use but the use of the state. (*Jackson v. Beach, 1 John. Cas. 399. Jackson v. Lunn, 3 id. 109. People v. Conklin, 2 Hill, 67.*)

The motion for a new trial must be denied.

[ONONDAGA GENERAL TERM, January 4, 1859. *Bacon, W. F. Allen and Mullin, Justices.*]

 WITHERHEAD vs. ALLEN and others.

A decision by a judge at chambers, under section 247 of the code, upon the frivolousness of a demurrer, is a judgment upon an issue of law, and not an order simply, from which alone an appeal can be taken.

An appeal may now be taken from such decision, as an order, if brought within the time allowed by section 349 of the code. If not, and judgment be entered, then it can only be appealed from as a judgment.

On a motion, at chambers, under section 247 of the code, a judge has power to make either an absolute or a conditional order, precisely as at a special term.

If the order or judgment is erroneous, in directing the amount for which judgment shall be entered, the judgment will only be irregular, and may be corrected or set aside on motion; but it cannot be reviewed on appeal to the general term.

Where, in an action against ten persons as members of a joint stock company or association, the complaint averred that the defendants were all shareholders in said association, during the year 1857; that while they were such shareholders, the company became indebted to the plaintiff for goods sold to the association, to the amount of \$162.51, and an action was commenced, on such demand, against the association, by the service of a summons and complaint personally, on its president; judgment obtained for \$178.12 dam-

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ages and costs; and execution issued and returned unsatisfied; *Held* that this was a good complaint, and contained all the facts necessary to show a good and perfect cause of action against the defendants; and that a demurrer for insufficiency was clearly frivolous.

Held also, that the court was authorized to render judgment against those defendants who joined in the demurrer, without including those with whom they were impleaded.

The recovery of a judgment against a joint stock association merges the original debt, and after redress has been sought by the creditor against the property of the association, and has failed, the shareholders become liable for the amount of the judgment, including the costs incurred in obtaining it.

The case of *Bailey v. Bancker*, (3 *Hill*, 188,) so far as it relates to the liability of shareholders for the costs of obtaining judgment against an association, must be regarded as limited to the particular statute then under consideration.

On appeal from a judgment for the plaintiff on account of the frivolousness of the demurrer to the complaint, that is the only question which can be reviewed. The extent of the defendant's liability does not arise.

THIS was an appeal from a judgment entered in pursuance of an order made by a justice of the court at chambers, directing judgment for the plaintiff on account of the frivolousness of the demurrer, under section 247 of the code. The action was against ten defendants, and the complaint averred that said defendants, during the year 1857, were members of, and stockholders in, a joint stock company or association, known as the "Ontario and St. Lawrence Steam Boat Company." That during and before October, of that year, and while the defendants were members thereof, the said company became indebted to the plaintiff, for goods sold and delivered, to its officers and agents, for its use and benefit, in the sum of \$162.51. That on the 26th November, 1857, the plaintiff commenced an action against said company, in the supreme court, by the service of a summons and complaint, personally, on Samuel Buckley, its then president. That judgment was entered in said action in favor of the plaintiff, on the 26th day of December, 1857, for \$165.23 damages, and \$12.89 costs, in the clerk's office of St. Lawrence county; execution issued on the same day, to the sheriff of said county, and that the same had been returned wholly unsatisfied. Wherefore, the plain-

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tiff demanded judgment for \$178.12, with interest and costs. The defendants, Allen, Averell and Seymour, demurred to this complaint, and assigned as ground of demurrer, that said complaint did not state facts sufficient to constitute a cause of action.

The plaintiff moved for judgment, before a justice at chambers, on account of the frivolousness of the demurrer, under § 247 of the code. The motion was granted, and final judgment ordered, for the sum demanded in the summons, with interest, to be computed by the county clerk, with the legal costs and disbursements, previous to notice of trial, and \$10 costs of motion.

Magone & Partridge, for the plaintiff.

Myers, Westbrook & Edick, for the defendants.

By the Court, JAMES, J. It is first insisted, that "the order directing *final judgment*, is erroneous; that the judge has only power to adjudge the demurrer frivolous, leaving the parties precisely as if no pleading had been interposed."

Whether a decision, under § 247, is an order or judgment, has given rise to many conflicting opinions, as well as adjudications, both at special and general terms. The better opinion seems to be, and the majority of cases so hold, that such a decision is a judgment upon an issue of law, and not an order simply, from which alone an appeal can be taken. (*King v. Stafford*, 6 *How. Pr. Rep.* 127. 5 *How.* 30, 247. 6 *id.* 21. 7 *Barb.* 581. 7 *How.* 396.) Many of the cited decisions arose on appeals as from an order, under § 349 of the code, and before the last amendment of that section. In those cases it was held, that such decision could not be appealed from as an order, but only as a judgment, after it had been entered. The amendment, in 1852, in express terms, gives an appeal from an order, made at special term, or by a single judge, when it sustains or overrules a demurrer. So that an appeal may now be taken from such decision, as an order, if brought within the

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time allowed by § 349. If not, and judgment be entered, as in this case, then it can only be appealed from as a judgment.

On a motion, at chambers, under § 247, whether it be called a trial, motion, or application, there is no doubt of the authority or power of the judge, to make either an *absolute* or *conditional order*, precisely as at special term. (*Witherspoon v. Van Dolar*, 15 *How.* 266.) As is there said by Justice Smith: "The power to hear the motion necessarily includes the power to make such a decision upon it as the court would make in term—just such an order and decision as the justice of the case requires." The power of the *court*, to direct the judgment which should be entered, was never doubted; and yet, the object, intent and purpose of § 247 was to vest in a judge, at chambers, the same power where a frivolous pleading was interposed, and it authorizes him to direct judgment, where it could be done without a reference. It would be absurd to say, that on a motion for judgment, the judge could not assess the damages in an action arising on contract, or on a note, bond or judgment; but that it must be referred to the clerk. If the order, on the motion for judgment, failed to direct the amount, then the damages would have to be assessed as in § 246, upon notice to the defendants' attorneys; the demurrer being regarded as an appearance. Such is the decision in *King v. Stafford*, (5 *How. R.* 30,) and no more. This view does not conflict with the decision, in the case of the *Western Rail Road Co. v. Kortright*, (10 *How.* 457,) so far as that decision has application to the point then before the court for adjudication; and but slightly with that part of the opinion which is *obiter*.

If the order for judgment is erroneous, in directing the amount for which judgment should be entered, the judgment can only be irregular, and may be corrected or set aside on motion, as in *King v. Stafford*, (5 *How. Rep.* 30.) It cannot be reached on this appeal, because that is not the question which was before the court, nor according to the defendants' theory, upon which it has the right to adjudicate. If the

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question before the court was simply the frivolousness of the demurrer, the appeal only brings up for review the correctness of the decision upon that question. Unless the court, or judge, had the power on such an application to assess the damages, in cases like the present, the order is simply informal, the judgment entered upon it irregular, and would be set aside on motion, but is not reached, nor can it be reviewed, on this appeal.

Was the demurrer frivolous? This presents the question, whether the complaint states facts sufficient to constitute a cause of action. By the act of 1849, any joint stock company or association, consisting of more than seven persons, may sue or be sued, in the name of its president or treasurer, and process in any action be served upon either of them. (*Laws of 1849, p. 389, § 1.*) This act, as amended in 1853, enacts as follows: "Suits against any such joint stock company or association, in the first instance shall be prosecuted in the manner provided in section 1, of the act of 1849; but after judgment shall be obtained and execution issued thereon shall be returned unsatisfied, in whole or in part, suits may be brought against *any* or *all* of the shareholders or associates, individually, as now provided by law." (*Laws of 1853, p. 283.*) This action was against ten persons as defendants. The complaint averred that they were all shareholders in said association, during the year 1857; that while they were such shareholders, the company became indebted to the plaintiff, for goods sold said association, to the amount of \$162.51; that while they were such shareholders, an action was commenced on such demand against the said association, by the service of a summons and complaint, personally, on its president; judgment obtained for \$165.23 damages, and \$12.89 costs, in all, \$178.12; execution issued and returned unsatisfied. This certainly was a good complaint, and contained all the facts sufficient to show a good and perfect cause of action against the defendants. A demurrer, for insufficiency, was therefore clearly frivolous.

It is, however, insisted, and made one of the points, that

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“there was no right of severance in taking judgment ; it should have been against all, or none, of the defendants sued.” If by severance, is meant entering judgment against those defendants who joined in this demurrer, and not against the others with whom they were impleaded, that question does not arise on this appeal ; it is but an irregularity which can only be reached by motion to set aside the judgment. But such judgment would seem to be authorized both by the acts of 1853, above cited, and § 274 of the code. The act of 1853 declares that “suits may be brought against any or all of the shareholders, as now provided by law.” The term “*any*” is not here used in its limited sense, but in its enlarged and plural sense, and is to be construed as meaning some, or an indefinite number. The code provides, that “in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper.” This has application as well to actions on joint, as on joint and several demands, and was intended as an abrogation of the common law rule. It has been held in one case, that a party could not avail himself of this provision, except through the medium of the courts. (11 *Pr. Rep.* 197.) If that be the true construction of the section, it may be said that the plaintiff in this case had such sanction.

It is also insisted, that the demurrer is not frivolous, because the complaint seeks to recover from the defendants the amount of the judgment against the association ; in other words, that the defendants, as shareholders, are not individually liable for the costs in obtaining that judgment. I have already shown, that the complaint in this action was good, and the demurrer frivolous ; and that was the only question before the judge below, and consequently the only one that can be reviewed on this appeal. But, in answer to the objection, it may be said, that the complaint was amply sufficient, and stated a good cause of action against the defendants. It showed an indebtedness of the company, of \$162.51 ; it stated the recovery of

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the judgment, its amount, the issuing and return of execution unsatisfied, in obedience to a statutory requirement as a condition precedent to the plaintiff's right of action against the shareholders. Here, then, was a perfect right of action stated, for some amount. Hence the demurrer was clearly frivolous. The demand for judgment being for too large a sum, did not affect the validity of the complaint. Such is not one of the causes of demurrer allowed by the code, § 144; a demurrer for such a cause would be frivolous.

But if this were an action distinctly and alone on the judgment, I should still be of the opinion that the demurrer was not well taken, although I might not have held it frivolous. The act of 1853 says, "that after judgment against the company and execution issued thereon and returned unsatisfied, suits may be brought against the shareholders of such association, individually, as now provided by law." What is meant by the phrase, as now "*provided by law*," unless it be the common law liability, to be sued as members of an unincorporated association? It has been repeatedly held, and may now be regarded as the settled law of this state, that under charters like this, the shareholders are placed precisely on the same footing as though not incorporated, answerable as partners at common law, for all debts contracted by the association. (*Allen v. Sewall*, 2 *Wend.* 327. *Moss v. Oakley*, 2 *Hill*, 265. *Bailey v. Bancker*, 3 *id.* 188. *Harger v. McCullough*, 2 *Denio*, 119. *Corning v. McCullough*, 1 *Comst.* 47.) Thus the shareholders are principal debtors, and the statute only suspends action against them, personally, until redress has been sought against the property of the association and has failed. If liable for the debts of the company, they are also liable for judgments recovered against it. In the language of Chief Justice Spencer, in *Slee v. Bloom*, (20 *John.* 669,) approved in *Moss v. McCullough*, (7 *Barb.* 279 :) "I perceive no escape from the conclusion that the shareholders are individually liable to the same extent that the company was liable. Whatever was a debt against the company, is now a debt against them; and

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if the company itself was concluded, the respondents were equally concluded." "Unless there be fraud or mistake, the judgment against the company, or a liquidation of a debt by the officers of the company, is as obligatory upon the individual members of the association when they are sought to be charged, as it is upon the corporation itself." (*Moss v. McCullough*, 7 Barb. 290.) And this must be so, upon principle. The company has power to contract debts in the course of its legitimate business; as partners the shareholders are liable as principal debtors; but the statute makes the company property the primary fund from which payment is to be sought; to determine the company's inability, the debt must be put into judgment, &c. This merges the original debt in the judgment, and the shareholders become liable for the debt that is, the judgment; and not for the debt that was. Such is the latest rule adopted in this judicial district, upon this very question, which has never, to my knowledge, been overruled.

Upon principle and authority, therefore, the case of *Bailey v. Bancker*, (3 Hill, 188,) so far as it treats of the liability of shareholders for costs of obtaining judgment against the association, must be regarded as limited to the particular statute then under consideration. The court, in that case, placed its decision upon the express words of the act, and the judge who wrote the opinion was careful so to express it. There is nothing in this case which so limits the liability of the defendants, and hence that case is not authority for the exemption of these defendants from the full force of the judgment against the association. But as I have before said, the extent of liability does not arise on this appeal. Had the defendants appealed within thirty days, from the order, as an order, under § 349, the question might have been presented for our adjudication.

On an appeal, after judgment, from an order rendering judgment on a demurrer as frivolous, the judgment will not be reversed, unless the general term is of the opinion that the demurrer is well taken. It will not be reversed, although the

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court may not think the demurrer was frivolous. (*Martin v. Kanouse*, 2 *Abb. R.* 327. *Laverty v. Griswold*, 12 *N. Y. Leg. Obs.* 316. 6 *Duer*, 688.)

Judgment affirmed.

[SCHENECTADY GENERAL TERM, January 4, 1859. *C. L. Allen, James, Rosekrans and Potter*, Justices.]

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WILLINS vs. WHEELER.

Where a defendant, in a justice's court, is a non-resident of the county in which the justice resides, the justice will acquire no jurisdiction of his person by the service of a summons issued by him returnable more than four days from the date.

Such a fatal defect in jurisdiction as that, cannot be cured by a mere omission to take the objection. The defendant, upon such a service, is never in court at all, nor in the jurisdiction of the magistrate; and he is not bound to do, or say, any thing in the premises.

If the objection is not taken before the justice, the defendant may raise it in the county court, on appeal.

Such a defect in the process by which jurisdiction should be acquired is an error in fact.

A fact outside of the record, which renders the judgment void, and which, when properly alleged and proved in any action or proceeding in which the judgment comes in question, will defeat any title or right claimed under it, is sufficient to reverse the judgment, in a direct proceeding for that purpose.

APPEAL from a judgment of the county court of Kings county. The appellant, a non-resident of Kings county, but a resident of the county of Wayne, was sued before a justice of the peace of Kings county, by a long summons; and upon a return thereof personally served, judgment was taken against him by default. On the return day of the summons, the defendant appeared before the justice, and stated that he did not appear in the case, but that he merely appeared to say he was a non-resident of the county of Kings. On appeal to the county court, the defendant made an affidavit, in which he stated the fact of his non-residence in Kings county. The

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county court affirmed the judgment of the justice, and the defendant appealed.

S. D. Lewis, for the appellant.

G. R. Lindsay, jun. for the respondent.

By the Court, EMOTT, J. If Wheeler was a non-resident of the county of Kings, the justice acquired no jurisdiction of his person by the service of the summons which he issued and which was returnable more than four days from the date thereof. Section 33 of the non-imprisonment act, (*Laws of 1831, ch. 300*,) not only prescribes a short summons as the only process by which a non-resident can be sued in a justice's court in cases where a warrant cannot be issued, but goes on to declare that if such a defendant be otherwise proceeded against "the justice shall have no jurisdiction of the cause." In *Harriott v. Van Cott*, (5 *Hill*, 285,) it was held that a justice's judgment against a non-resident of the county, sued by long summons, was void, and would not justify a seizure of goods under execution, in a suit against the plaintiff for taking them. In *Bowne v. Mellor*, (6 *Hill*, 496,) the same rule was held as to a judgment in a suit commenced, by a long attachment, against a non-resident. The defendant in the present case did not appear, so as to give the justice jurisdiction. He appeared at the return day of the summons to state that he was not a resident of the county of Kings. I do not see why this was not a good plea to the jurisdiction. But as the justice chose to disregard it, and proceeded, after an adjournment, to take testimony, and render judgment against the defendant, the objection, which he thus attempted to interpose, certainly was not waived nor obviated. The judgment was entirely null, and the plaintiff could not enforce it in any way. Whenever and wherever the defect in jurisdiction is properly brought to the knowledge of the court, it must be fatal to the judgment and to any proceeding under it. It is said that the

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defendant was bound to appear before the justice and take the objection to the form of the process, or that it was waived. Admitting that what the defendant did was not sufficient to raise the objection in the justice's court, it is very clear from an unbroken series of decisions, of which those I have cited above are part, and to which numerous others might be added, that such a fatal defect in jurisdiction cannot be cured by a mere omission to take the objection. The defendant is never in court at all, nor in the jurisdiction of the magistrate, and he is not bound to do, or say any thing in the premises. The cases upon this point will be found collected, and the point stated by Judge Bronson, in his dissenting opinion in *Barnes v. Harris*, (4 Comst. 375, 379.) If the reasoning of this opinion, in which Judge Jewett concurred, does not raise a grave doubt as to the correctness of the point ruled by the majority of the court in that case, it certainly shows the incorrectness of the remark made by Judge Gardiner, in the prevailing opinion, that upon due service of the process issued, the defendant will be concluded by the judgment subsequently obtained, unless he appears and takes his objection. That proposition will not be found to be sustained by the authorities cited under it, and it is an *obiter dictum* not involved in the decision of the cause. *Barnes v. Harris* was a question of pleading, and all that it decides is, that in declaring in an action on a judgment, in a justice's court, it is not necessary to aver that the defendant was a resident of the county, so as to show that the long summons was the proper form of process. In other words, it is not necessary to negative the exceptions made by the statute to the ordinary methods of proceeding in these tribunals. The case is not an authority for the doctrine that jurisdiction is gained, or the radical defect in the proceedings cured, by omitting to take the objection before the justice. No such question was before the court.

In the case at bar the objection was brought to the notice of the justice, as I have already stated; but if the allegation made by the defendant on the return of the summons was not

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a sufficient plea in abatement, I see no reason to doubt that the defect was properly brought before the county court by the affidavit offered. It does not distinctly appear whether the affidavit was rejected, or the objection overruled. Either way, the court erred. It is true this method of trying errors in fact, upon affidavit, is a crude method of procedure, and strikes with surprise a legal mind accustomed to the former practice. It is part of the code, however, and we are bound to administer it to the best of our ability. As the defendant set up this objection in the county court, in the only way which the present practice permits, he is exempted even from the rule which Judge Gardiner states, if that were the law.

There can be no doubt that such a defect in the process by which jurisdiction should be acquired is an error in fact. A fact outside of the record, which renders the judgment void, and which, when properly alleged and proved in any action or proceeding in which the judgment comes in question, will defeat any title or right claimed under it, is sufficient to reverse the judgment, in a direct proceeding for that purpose.

The judgments of the county court of Kings county, and of the justice, must be reversed.

[KINGS GENERAL TERM, February 14, 1859. *Lott, Emott and Brown, Justices.*]

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A

ACTION.

1. An action will lie to recover compensation for services rendered to another, under a contract, in putting up and taking down a tent, used by the employer as a place for holding public meetings of the political friends of a particular candidate for the presidency, during the canvass preceding a presidential election. *Hurley v. Van Wagner*, 109
2. Individuals owning lots fronting on a public street of a city may maintain an action to enjoin the construction in such street of a railway, which would be specially injurious to their property. *Milkau v. Sharp*, 228
3. Consignees of goods and holders of the bill of lading, who have made advances upon it, have an interest or property in the goods, which will entitle them to bring an action against the carrier, for the loss, waste or wrongful conversion thereof. *Adams v. Bissell*, 382
4. Such a cause of action may be joined with a claim to recover back a sum overpaid by the plaintiffs to the defendants, on account of the freight of the goods. *ib*
5. The plaintiffs, being manufacturers of oils and varnish, entered into an agreement with R. & Co. by which the plaintiffs undertook to increase the capacity of their works, so as to produce double the quantity of oils and varnish then manufactured, and when they were thus prepared to extend their business, R. & Co.

agreed to advance them \$10,000, to be refunded as thereafter provided. The oils and varnish were to be consigned to R. & Co. for sale, and after paying advances, commissions, &c., they were to retain sufficient to refund said advance of \$10,000. As a further security for the \$10,000 the plaintiffs agreed that when the same was advanced they would deliver to R. & Co. bills of sale of the machinery in the oil works, and assign a policy of insurance upon the factory and machinery, to the amount of \$10,000. Subsequently the plaintiffs transferred to the defendant all their right and interest in the said agreement and its stipulations, except the receipt of the \$10,000. The defendant thereupon assumed all the obligations of the plaintiffs in their contract with R. & Co., and agreed to build and fit up the factory, and to make a bill of sale to R. & Co. on the said factory, for the \$10,000 to be advanced by R. & Co., and that R. & Co. might pay over the \$10,000 to the plaintiffs, for their own use. In an action for a breach of this agreement, the breach assigned was that the plaintiffs had requested the defendant to procure a policy of insurance for the sum of \$10,000 and assign the same to R. & Co., and had also requested him to execute and deliver to R. & Co. a bill of sale of the machinery in the factory as security to them for the sum of \$10,000, so to be advanced by them; which the defendant had refused to do. *Held*, that in the absence of any averment, or proof, that the plaintiffs had been damaged in any way by the breach of the defendant's contract; or that in consequence of such breach R. & Co. had refused to

pay them the \$10,000, the action would not lie. *Rider v. Pond*, 447

6. A right of action against a common carrier, for negligence in not transporting and delivering personal property, is assignable, so as to authorize the assignee to sue in his own name. *Smith v. New York and New Haven Rail Road Company*, 605

See ARREST.

FALSE REPRESENTATIONS.

ADVERSE POSSESSION.

1. Neither the common law rule, nor the statute making conveyances of land held adversely void as to the party in possession, applies to conveyances by the people of the state, or by public officers duly authorized. *The People v. Mayor &c. of New York*, 240
2. Such conveyances are not within the reason of the common law rule, or of the statute; and strictly there can be no adverse possession, as against the people. The people cannot be disseised. *ib*
3. A lease of lands, from the people to individuals, is valid, and gives to the lessees a right of entry, although the premises are, at the time, actually held and occupied under a title hostile to the title of the state. And having the right of entry, the lessees can bring their action to recover the possession, and the rents and profits since the execution of the lease, as damages, &c. *ib*

AGREEMENT.

1. In a case simply between debtor and creditor, the debt being undisputed and due, and drawing interest, no valid agreement can be made, by parol, to postpone to a future day the payment of the debt. Yet it may be postponed by a new written contract. *Kellogg v. Olmstead*, 96
2. A parol agreement between the payee of a promissory note and the makers, after the same becomes due, that in consideration that the makers will keep the principal sum specified in the note, until a future

day mentioned, and pay the same with interest on that day, the payee will extend the time of payment of the principal until the day mentioned, is not valid, either upon the principles applicable to cases of forbearance to sue, or on the ground of accord and satisfaction. *ib*

3. A mere moral obligation is not a sufficient consideration to support a promise, unless it is founded on a previous legal liability. *Goulding v. Davidson*, 438

See FRAUDS, STATUTE OF.

RAIL ROAD COMPANIES, 1, 2.

ALIENS.

1. In the year 1809, George Parish, an alien, having been empowered by an act of the legislature to take and convey real estate, purchased a large tract of land, including lot No. 687, in the county of Jefferson. The defendant W. purchased of Parish a part of said lot, and took a deed which contained an exception of all mines and minerals, and particularly of all the ore of iron, copper or lead. Parish died in 1826 intestate, and without issue, leaving surviving him his father John Parish, and his brothers George, Charles, Richard and John, all of whom were aliens. In 1817 an act was passed, by the legislature, enabling George to take real estate by purchase or descent. In 1827 he made his will, devising all his estate to J. R. in trust, directing his real estate to be converted into personal estate, and the payment of two bonds held by his brother Richard; and devising the residue of his estate to Richard. He died in 1838. John Parish, the father, died after David's death, and before the death of George. In 1841 the plaintiff, who was the son of Richard, and an alien, was authorized to take and hold real estate. J. R., the trustee under the will, conveyed a large tract of land to the plaintiff, together with all mines and minerals reserved in certain deeds given by David, including the ore bed in question, located on said lot No. 687. In an action brought by the plaintiff to recover damages and to restrain W. and those acting under him from digging and carry-

ing away iron ore from a bed on said lot; *Held*, 1. That the act of 1807, enabling David Parish to acquire, hold and alienate real estate, invested him with inheritable blood, and clothed him with the power of transmitting his estate to his next of kin. 2. That dying intestate his estate would descend, the same as that of a citizen by birth; and would not escheat; provided an heir capable of taking by descent could be found. 3. That the act authorizing David Parish to take and hold real estate did not assume to qualify, or change, in any respect, the general law of descent; or to remove the barrier of alienism existing against alien heirs. And that therefore John Parish, the father of David, could not inherit from him. 4. That the estate of which David Parish died seised descended to his brother George, by virtue of the act of 1817 clothing him with inheritable power; and that under the provisions of that statute authorizing him to alienate, it was competent for him to make a will disposing of the property. 5. That the trust created by the will of George was valid, under the statute authorizing the creation of a power in trust to sell lands for the benefit of creditors; and that under the execution of the power in trust by J. R. the trustee, the plaintiff acquired a valid title to the bed of iron ore in controversy, and could maintain the action. *Parish v. Ward*, 328

See WILL, 10, 11, 12.

APPEAL.

1. Where an action is brought against a married infant by her husband, to dissolve the marriage contract on the ground of impotence, the mother of the defendant has no interest in the matter which will allow her to intervene and become a party to the litigation; especially after a guardian *ad litem* has been appointed for the infant, and the suit has proceeded to a decree, by which the marriage has been dissolved. The mother therefore has no right to appeal from any decision made in the cause, so as to bring the merits thereof before the court for examination. *E. B. v. E. C. B.* 299

2. Although the court may hear her communications as *amicus curiæ*, that will give no warrant for her, in that capacity, to appeal from the decision made upon her application. *ib*

3. An application to open a sale under a judgment, on the ground of misapprehension as to the time of sale, or any other circumstances not affecting the regularity of the proceedings, is addressed to the discretion of the court; and an order made thereon is not appealable. *Kingsland v. Bartlett*, 480

4. A decision by a judge at chambers, under section 247 of the code, upon the frivolousness of a demurrer, is a judgment upon an issue of law, and not an order simply, from which alone an appeal can be taken. *Witherhead v. Allen*, 661

5. An appeal may now be taken from such decision, as an order, if brought within the time allowed by section 349 of the code. If not, and judgment be entered, then it can only be appealed from as a judgment. *ib*

6. On a motion, at chambers, under section 247 of the code, the judge has power to make either an absolute or a conditional order, precisely as at a special term. *ib*

7. If the order or judgment is erroneous, in directing the amount for which judgment shall be entered, the judgment will only be irregular, and may be corrected or set aside on motion; but it cannot be reviewed on appeal to the general term. *ib*

8. On appeal from a judgment for the plaintiff on account of the frivolousness of the demurrer to the complaint, that is the only question which can be reviewed. The extent of the defendant's liability does not arise. *ib*

ARREST.

1. A cause of action, originally within the exceptions of the act of 1831 to abolish imprisonment for debt, does not lose that character by being assigned to a third person. *King v. Kirby*, 49

2. The remedies provided by that act were intended to aid the enforcement of the claim, in whose hands it might be; provided the relation of the parties remained the same, and the cause of action had not been substantially changed. *ib*
3. Accordingly held that the assignee of a judgment recovered against a debtor for fraud and false and fraudulent representations, could institute proceedings under the act of 1831, for the arrest and imprisonment of the judgment debtor; especially where it appeared that some of the acts of fraud were committed after the assignment of the judgment. *ib*
4. Proceedings had in England, under a writ of extent issued out of the court of exchequer, against an individual, for embezzling or fraudulently misapplying the public money, which result in the finding, by the inquisition of a jury, that a specified sum is due from the defendant, to the British government, will not have the effect to waive, or merge or extinguish the original claim; so as to prevent the bringing of an action thereon, in this state, and the arrest of the defendant under the provisions of sub. 2 of sec. 179 of the code, authorizing defendants to be arrested in actions to recover money or property embezzled or fraudulently misapplied by a public officer. *Peel v. Elliott*, 200
5. Such extent and inquisition amount to nothing as a cause of action, here; and being ineffectual for that purpose, they are also ineffectual to deprive the creditor of the benefit of the circumstances under which the original cause of action arose, and the provisional remedies applicable thereto. *ib*
6. Where a person, who is actually insolvent, purchases goods on credit, upon the strength of his own representations that he is solvent and responsible, yet he is not liable to arrest, in an action brought to recover the value of the goods, if, at the time he made the representations, he believed them to be true. *Birchell v. Strauss*, 203
7. In all cases in which fraud is charged, proof of an actual intent ought to be required, to justify or sustain an order of arrest. The constructive guilt of a debtor, who is innocent in fact, should not be held a sufficient ground for his imprisonment. *ib*
8. Although there be circumstances attending and following the execution of an assignment of his property, by a debtor, which may be evidence of constructive fraud, sufficient to set aside the assignment, yet they will not be deemed evidence *per se*, of an actual fraudulent intent on the part of the debtor, furnishing sufficient ground for his imprisonment. *ib*

ASSESSMENTS.

1. The true and exact apportionment of the expenses of grading and paving streets in cities can never be determined by any fixed rule. Like the assessment of unliquidated damages by a jury, the sum to be contributed by each owner must rest in the judicial discretion of the assessors. The most that can be attained, or hoped for, is an approximation to what is just. *Per Brown, J. Lyon v. City of Brooklyn*, 609
2. From the very nature of the duty assigned to assessors, their power in determining the amount which each particular piece of property chargeable shall contribute, must be nearly absolute, and their report or assessment roll final and conclusive; unless it is of such a character as to shock common sense, and furnish intrinsic evidence of fraud, or other misconduct. *Per Brown, J. ib*
3. The supreme court cannot legally vacate or set aside an assessment for the expenses of grading and paving a street in the city of Brooklyn, upon the sole ground that the assessors have not distributed the expenses of the improvement in due proportion upon the lands which are chargeable. *ib*

ASSIGNMENT.

See DEBTOR AND CREDITOR, 3 to 8.

ENDORSEMENT AND ASSIGNEE.

A right of action against a common carrier, for negligence in not transporting and delivering personal property, is assignable, so as to authorize the assignee to sue in his own name. *Smith v. New York and New Haven Rail Road Company*, 605

See ARREST, 1, 2, 3.

ATTACHMENT.

1. Where an action is commenced against a foreign corporation, by attachment, and the sheriff levies on money on deposit in a trust company, and the defendant, instead of procuring the attachment to be discharged by giving security or applying for an order directing the sheriff to collect the debts attached by him, appears and makes a defense which is unavailing; and in consequence of the delay thus produced, the debt is lost, by the failure of the trust company, the defendant must bear the loss, rather than the plaintiff. *McBride v. The Farmers' Bank of Salem*, 476

2. A levy upon property, under an attachment, does not amount to a satisfaction of the debt. *ib*

3. A legal proceeding, regular on its face, instituted by one party against another, in violation of good faith, or contrary to his express agreement, and with a fraudulent intent, cannot be treated as a nullity, where the question arises collaterally. On the contrary, the courts are bound to treat it as a legal and valid proceeding, until it is set aside on a direct application for that purpose. *Whitaker v. Merrill*, 526

4. A debtor, for the purpose of effecting a compromise with his creditors, dispatched an agent to negotiate with them, entrusting him, for that purpose, with certain promissory notes made by a third person, and then held by the debtor. The agent thereupon called upon the defendants who were among the largest creditors, and they agreed to compromise their claim at twenty-five cents on the dollar, and signed a paper to that effect. They then

proposed to have W., a person in their employ, take the notes and go to the other creditors, and get them, also, to sign the compromise. Having got possession of the notes in this manner, they refused to restore them; commenced a suit against their debtor, and obtained an attachment therein, by virtue of which the notes were seized by the sheriff, in the hands of W. The plaintiffs in that suit subsequently recovered a judgment, and by virtue of the attachment and judgment they claimed the right to retain the notes. *Held*, in an action by the assignees of the debtor, to recover of the defendants for the conversion of the notes, that the attachment, and the seizure of the notes thereon, constituted a full and complete defense; and that the only remedy of the plaintiffs was by an action for the alleged fraud and breach of faith. *ib*

ATTORNEY GENERAL.

1. Even if it be conceded that the attorney general may maintain an action, in the name of the people, to restrain a municipal corporation, it can only be to restrain them from making a fraudulent or illegal disposition of the corporate property. *People v. Lowber*, 65

2. Where such fraud is the foundation of the action, it must be distinctly charged in the complaint. *ib*

B

BILLS OF EXCHANGE.

1. B., the agent of a corporation, drew a draft upon the company at New York, in favor of M., for the amount of a protested draft previously drawn by such agent, in M.'s favor, and then held by him. Both the drawer and the drawee were insolvent at the time the draft was drawn, and were known to M. to be so. In drawing the draft, B. acted only as the agent of the company, had no funds in the hands of the drawees, and had no reason to believe that he had any. M. sent the draft to the defendants, a banking house at New York, for collection. It was duly presented

for acceptance, and was accepted, but was not presented and protested for non-payment. *Held*, that the defendants were not bound to present the draft and demand payment, and were not liable to M. for their neglect to do so. *Mobley v. Clark*, 390

2. Where the drawer of a bill has no funds in the hands of the drawee, applicable to the payment of the bill, a presentment of the bill for payment, and protest and notice, are not necessary to charge the drawer. *ib*

BILL OF LADING.

1. N. & W. of Buffalo, being the owners of a quantity of corn, at that place, sold the same to M., through B., his agent; it being a part of the arrangement that N. & W. should transport the corn to New York, for M., on their boats. N. & W. thereupon executed an instrument stating the shipment of the corn, the quantity thereof, the name of the boat, the amount of freight, the terms of payment of the purchase money; and that the corn was on account of, and addressed to, M., care of D. & C., and was to be delivered as addressed, without delay. *Held* that this was a bill of lading. *Dows v. Rush*, 157
2. *Held also*, that upon its face, the instrument was a certificate from N. & W. in both their capacities, of owners of the shipping boat and owners or vendors of the corn, that the grain was shipped on account of M., or for his benefit, and for his benefit as the purchaser and owner of the goods, to D. and C. as consignees. *ib*
3. And such bill of lading having been delivered by N. & W. to B., and by him sent to M.; *Held*, that M. had lawful possession of the same, as apparent owner, and through such bill of lading the constructive—the legal—possession of the corn; and that the transfer of such bill by him, amounted to a transfer of the corn. *ib*
4. *Held further*, that persons receiving, in good faith, and as security for advances actually made, a transfer of the bill of lading and of the goods, from M., were brought within the protection of the rule of law which prefers the title of a bona fide purchaser from a fraudulent vendee, to that of the original owner. *ib*
5. *Held, also*, that in the absence of proof that the purchase of the corn was *originally* fraudulent, or that the transaction was obnoxious to any other imputation of fraud than such as arose from a *subsequently conceived* determination not to pay for the goods, N. & W. and those claiming title to the corn under them, were, as against the assignees of the bill of lading, *estopped* from denying that N. & W. held the grain as M.'s agents and carriers; they not being in a situation effectually to dispute the title of the assignees, thus acquired. *ib*
6. D. & C., the assignees of the bill of lading, were to be deemed the consignees of the corn, and as such entitled to a *lien* thereon, for the amount of their advances, under the act relative to *principals and factors*. (*Laws of 1830. ch. 179, §§ 1, 2. 2 R. S. 4th ed. 184.*) *ib*
7. The statute does not limit the consignees to the right of detention of the goods when in their actual possession, for the enforcement of their lien; but it also authorizes an action by them, to obtain possession, against a party claiming them without right, or under an inferior title. *ib*
8. In such an action the plaintiffs are not restricted, in respect to the amount of damages, to their advances and interest thereon. *ib*

See ACTION.

VENDOR AND PURCHASER, 10.

BONA FIDE PURCHASER.

1. Where in an action to recover the possession of personal property to which the plaintiff claims title under a chattel mortgage executed to him by a third person, and which property the defendant claims to hold as a bona fide purchaser for value from the mortgagor after the lapse of a year from the filing of the mortgage, if it is shown that he purchased without notice of the mortgage, and

there is no evidence that the mortgagor owed any person other than the mortgagee at the time of the sale to the defendant, it cannot be presumed that the defendant purchased the property with intent to defraud the creditors of his vendor. *Stanbro v. Hopkins*, 265

2. It is therefore erroneous to charge the jury that if they believe from the evidence that the defendant purchased the property with intent to defraud the creditors of the vendor, the plaintiff is entitled to a verdict, although they should find that the defendant did not know of the plaintiff's mortgage, or of the debt then due to him *ib*

BOND.

See INJUNCTION, 2, 7, 8, 9.
SHERIFF.

C

CARRIERS.

1. Persons whose business it is to receive packages consisting of coin, bullion, bank notes, commercial paper, and such other articles of value as parties think fit to intrust to their care, for the purpose of transporting the same from one place to another, for a compensation, are *common carriers*, and responsible as such for the safe delivery of property intrusted to them. And they will be held to the stringent rule of law which makes a carrier an insurer against all except the act of God and the public enemy. *Sherman v. Wells*, 403
2. Where goods are intrusted to a carrier and not delivered according to contract, the value of the goods, with interest thereon from the day when they should have been delivered, is the measure of damages. *ib*
3. A mere delay, in the delivery of goods, by a common carrier, is not a conversion of the property; nor will it entitle the owner to recover the value thereof. *Briggs v. New York Central Rail Road Company*, 515
4. Where the defendant undertook to transport a quantity of garden seeds from Rochester to Rome, and there deliver the same to the Rome and Watertown Rail Road Company, to be conveyed to Sacket's Harbor, upon which delivery to the latter company the liability of the defendant should cease, and there was a delay of twelve days in so delivering the goods, but the same were delivered to that company before the commencement of the action; *it was held* that the delivery to the Rome and Watertown Rail Road Company was equivalent to a delivery to the plaintiffs, and that such delivery having been made before suit brought, no right of action existed, except for the unreasonable delay of the defendant in the transportation and delivery of the goods. *ib*
5. *Held also*, that in an action by the owners of the goods, against the carrier, the plaintiffs were not entitled to recover the value of the goods, but only for such trouble and expense as resulted directly and necessarily from the negligence and delay of the defendant in performing its undertaking. *WELLES, J.* dissented. *ib*
6. *Held further*, that the plaintiffs could not recover for the time and expenses of an agent and team, while waiting for the goods at Sacket's Harbor; without showing that the defendants had notice, at the time of contracting for the transportation of the goods, that an agent of the owners would be waiting at Sacket's Harbor, to receive them. *ib*

See ACTION, 2.

RAIL ROAD COMPANIES, 13 to 16.

CASES APPROVED. EXPLAINED OR LIMITED.

1. The case of *Bailey v. Bancker*, (3 *Hill*, 188,) so far as it relates to the liability of shareholders for the costs of obtaining judgment against an association, must be regarded as limited to the particular statute then under consideration. *Witherhead v. Allen*, 661
2. The case of *Broderick v. Smith*, (15 *Howard's Pr. Rep.* 434,) explained. *Ferris v. Ferris*, 29

3. The case of *Fleeman v. McKean*, (25 Barb. 474,) approved. *Dows v. Den-nistoun*, 893
4. The case of *Jackson v. Walker*, (5 Hill, 27,) should not be extended beyond the circumstances out of which it arose. *Hurley v. Van Wagner*, 109
5. The decision of the superior court of New York, in *Watkins v. Halstead*, (2 Sandf. Sup. C. Rep. 311,) approved. *Goulding v. Davidson*, 438

See CORPORATION.

CERTIFICATE OF ACKNOWLEDGMENT.

1. Where a commissioner of deeds, in a certificate of acknowledgment, certifies to a material requisite to the validity of a certificate, and without which he could not legally take an acknowledgment, viz. that he knows the parties by whom the instrument purports to have been executed—which statement is untrue—such certificate is a nullity, both in respect to the recording of the instrument, and as proof of the execution thereof. *Watson v. Campbell*, 421
2. As between the parties, however, the instrument would be valid, without any certificate of acknowledgment, upon proof that it was executed and delivered by the grantors. *ib*

CHATTEL MORTGAGE.

1. A receiver should never be appointed over a mortgagee of chattels in possession, where he swears to a balance due him; much less where the plaintiff himself states such balance, and that the pledge is not an inadequate security for such balance. *Bayard v. Fellows*, 451
2. Where there is no allegation of danger, or irresponsibility on the part the mortgagee, he will not be restrained, by injunction, from selling the same, to reimburse himself for his advances. *ib*
3. Nor will a receiver be appointed, to take the property out of his possession and make sale thereof, and keep the proceeds, until the accounts are finally settled between the parties. *ib*
4. Neither will the fact that the mortgagor has a claim against the mortgagee, arising out of a different transaction, which claim, if valid, is a set-off against the sum due upon the mortgage, but which is not established nor the amount thereof adjusted, entitle the mortgagor to an injunction and receiver, in respect to the property pledged. *ib*

See BONA FIDE PURCHASER.

CHECK.

1. A check, drawn upon a bank in the city of New York, by T., payable to the order of M., and indorsed by M. & G., and held by C., claiming to be the owner, and who resided in another state, 73 miles distant from the city of New York, and due and presentable on the 25th of May, was discounted by the plaintiff on the 28th of May, and transmitted to its agent in New York by the first mail thereafter, and the same was received by the agent on the 29th and presented to the drawee, for payment, on the 30th of May. *Held* that although the check was made eleven days before the time it bore date, and was not designed by the maker and indorsers for immediate presentation and payment, yet that, as the plaintiff received the same without notice of those circumstances, he was to be deemed a holder in good faith, and for value, and entitled to all the rights of an indorsee of negotiable paper, under the law merchant. *Middletown Bank v. Morris*, 616
2. *Held also*, that under the circumstances the plaintiff might fairly assume that the check was created and indorsed with a view to its being put in circulation. *ib*
3. *Held, further*, that by making the check payable at a future day, both the maker and the indorsers intended that the holder might either put it in circulation, or return to his place of residence and retain it in his possession until the time of its maturity. *ib*
4. And the holder having returned home, taking the check with him; and it appearing that no more time

had been spent in presenting the check than would have been required for the passage of a letter from his residence to the place of payment; it was *held* that reasonable diligence had been used by the plaintiff, to charge the indorsers. *ib*

CLAIM AND DELIVERY OF PROPERTY.

Where, in an action claiming the delivery of personal property, a third person, on behalf of the plaintiff, executes an undertaking pursuant to, and in accordance with, section 209 of the code, conditioned for the payment to the defendants of such sum as may "for any cause" be recovered against the plaintiff; and the defendants subsequently obtain a judgment against the plaintiff for costs, and, upon appeal to the general term, such judgment is affirmed, with costs of the appeal; the two bills of costs are within the undertaking, and the obligor is liable therefor. *Tibbles v. O'Connor*, 538

COMMON SCHOOLS.

1. Although the law does not imperatively require that a school district meeting shall be held within the bounds of the district, it is eminently fitting that it should be so held. *Myer v. Crispell*, 54
2. Where defendants justified the taking of property on a tax warrant issued by them as trustees of a school district, and it was objected that they were not legally trustees, because chosen at a meeting of the inhabitants of the district, held outside of the district; there being no evidence of abuse, nor that the place of meeting was an inconvenient or inaccessible place; nor that any objection was taken, at the time, on that account; nor that the inhabitants were not fully notified and represented at the meeting; nor that any action was ever had to oust the trustees on that account; but on the contrary, it appeared that they subsequently acted, without objection, as trustees, and sufficiently so to constitute them officers *de facto*: *it was held* the objection was unavailable. *ib*
3. Where a tax was voted at a school meeting held in the district, adjourned from a previous meeting held outside of the district, it not appearing that at the original meeting any inhabitant was not notified, or complained, then or afterwards, of the irregularity; or that there was any inhabitant absent from the adjourned meeting; and the evidence showing that it was a meeting of the freeholders and inhabitants of the district; and there being no proof of any objection or complaint of the irregularity of the proceedings having been made, at the second meeting: *it was held* that the court might presume a waiver of the irregularity, if it were such, and a unanimous assent to the regularity of the adjourned meeting. *ib*
4. Where a school district voted "to raise by tax on the district a sum which, together with the amount that should arise from the sale of a school house in district No. 4, should amount to the sum of \$315," under which resolution the trustees raised by tax the whole sum of \$315, not having sold the school house, in consequence of a doubt of their right to do so: *Held* that the fair construction of the resolution was, that in the contingency of nothing being realized from the sale of the school house, the trustees were authorized to raise the entire amount of \$315, by tax; and that the amount to be raised was sufficiently *degreed* to satisfy the law. *ib*
5. Where M. was an actual resident of school district No. 4, and his homestead farm lay in that district, but he improved and occupied a lot of 37 acres lying in district No. 6, which lot was not a part of his farm, nor attached to it, nor adjoining it; *Held* that M. was a taxable inhabitant of district No. 6, and that the 37 acres were properly taxed for school purposes, in that district. *ib*

CONSIGNEES.

See ACTION, 3.

CORPORATION.

1. In an action brought by a corporation, or its assignee, upon an agree-

ment, no specific allegation, in the complaint, of the incorporation of the company, is necessary. *Kennedy v. Colton*, 59

2. A statement of the name of the corporation, and of the making of the agreement between the defendant and the company, and of what the company did in fulfilment of the agreement, includes the idea of the legal existence of the company; and the fact of incorporation is mere evidence in support of it, not essential to be particularly stated, in the pleading. *ib*
3. The common law rule, on this subject, is wholly unaffected by the provisions of the revised statutes giving a short form of pleading their incorporation by corporations created by statute, and relieving such corporations from proving, in actions brought by them, their corporate existence, "unless the defendant shall have pleaded in abatement or bar that the plaintiffs are not a corporation." *ib*
4. This rule of the common law is too well sustained by authority, to be shaken by the cases of *Johnson v. Kemp*, (11 *How. Pr. Rep.* 186,) and *The Bank of Havana v. Wickham*, (16 *id.* 97,) which, upon that point, did not receive due consideration. *ib*
5. A defendant cannot object that the incorporation of a company was not proved, where it does not appear that the objection was taken at the trial. *ib*
6. Nor can he raise the objection, afterwards, where it affirmatively appears that it was assumed at the trial that the company was a corporation; the defendant at no time intimating that it was not such. *ib*
7. A corporation cannot recover back usurious premiums paid by it on the loan or forbearance of money. *Butterworth v. O'Brien*, 187
8. A stockholder in a corporation is a party to a suit brought against such corporation. (BALCOM, J. dissented.) *Place v. Butternuts Woolen and Cotton Manuf. Company*, 503

See INJUNCTION, 2.

TAXES AND TAXATION.

CREDITOR'S SUIT.

1. A complaint, in the nature of a creditor's bill, alleged the recovery of five judgments by the plaintiffs against D. M. and the issuing of executions and the return thereof unsatisfied. That previous to the recovery of the judgments, D. M. was the owner of certain real estate, which he conveyed to J. G. M. without any consideration, and with intent to defraud creditors; and that D. M. had other equitable interests which ought to be applied on said judgments. The complaint prayed that the sale and conveyance of the land might be set aside, and for equitable relief, &c. No equitable property was discovered; and it appeared in proof that the real estate had been conveyed to one G. before the commencement of the suit. G. was not made a party to the suit. *Held* that the referee should have dismissed the complaint, or suspended the trial until the plaintiffs, by amendment or supplemental bill, had made G. a party. *Sage v. Mosher*, 287
2. *Held also*, that the action as a creditor's bill, having at the time of the trial, entirely failed of its object, it could not be converted into a legal action for the purpose of recovering a judgment for damages, against the defendants, or either of them. *ib*

D

DAMAGES.

Where goods are sold by sample, and are represented to be of a specified quality, the rule of damages in an action for a breach of warranty, or for false representations, is the difference between the price obtained, on a resale, and that which would have been obtained had the goods been of the quality represented. *Roberts v. Carter*, 462

See CARRIER, 2, 5, 6.

DEATH BY WRONGFUL ACT, &c.

1. An action can be maintained, under the act of 1847, "requiring compensation for causing death by wrong-

ful act, neglect or default," by an individual as administrator of his deceased wife, whose death was caused by the negligence of the defendant, although the deceased left no father or mother or descendants surviving her. *Dickens v. New York Central Rail Road Company*, 41

2. An action can be maintained by the personal representative of a deceased person, whose death has been wrongfully caused by the defendant; although the deceased left no husband or wife or next of kin surviving, who could ever have any legal claim upon such person, if living, for services or support. *Per BALCOM, J. ib*

3. The language of section 2 of the act of 1847, declaring that the jury "may give such damages as they shall deem a fair and just compensation," &c. "with reference to the pecuniary injury resulting from such death, to the wife and next of kin of such deceased person," is merely permissive; and cannot be regarded as restricting the jury, on the question of damages, to the pecuniary injury resulting from the death of the person killed, to the wife and next of kin of the deceased. *ib*

See HUSBAND AND WIFE 1, 2.

DEBTOR AND CREDITOR.

1. Remedies of creditors.

1. Although in equity several judgment creditors may join in one suit to reach the equitable property of their common judgment debtor, or remove a fraudulent incumbrance in the way of the collection of their judgments, they cannot thus unite in an action at law. *Sage v. Mosher*, 287

2. They are not entitled to a common joint judgment at law; and an equity suit cannot thus be turned into a suit at law for the recovery of damages. *ib*

2. Assignments by debtor, for benefit of creditors.

3. An assignment of all the debtor's property, stated to be "more partic-

ularly enumerated and described in a schedule thereof" thereto annexed, marked A, is not void by reason of the omission to annex the schedule. Nor is such omission evidence of even a constructive fraud. *Birchell v. Strauss*, 293

4. Where one of two partners in a firm doing business here is absent in a distant state, and thus unable to assist in the management of the business, and to assent to such transfers of its property as the exigencies of its affairs may demand, *it seems* that such absence, if it does not warrant the remaining partner in making an assignment of the partnership property, in trust, for the benefit of creditors, will authorize the presumption that he was duly empowered to make such an assignment as attorney for the absent partner, until the contrary appears. *Sheldon v. Smith*, 593

5. And no one but the absent partner can question the validity of an assignment thus executed. It is not void *per se*, but only voidable at the election of the absent partner. *ib*

6. If, upon his return, the absent partner affirms and ratifies an assignment, executed during his absence by his partner, in his name and as his attorney, such ratification will relate back to the time of the original execution of the instrument, and render the assignment valid and operative from that time. *ib*

7. Such assignment, being a complete and perfect deed immediately on its execution and delivery to the assignees, it is from that time entirely beyond the control of the resident partner, and he has no power to alter, amend or vary its terms or provisions. *ib*

8. Hence, he cannot vary its effect by making a note to a creditor, in the name of the partnership, after the execution of the assignment, and dating it back to a day prior to the execution of that instrument, for the purpose of having such note embraced in the schedule of debts preferred in the assignment. *ib*

See AGREEMENT.

DECREE.

1. A proceeding in the courts of a sister state, confessedly illegal, cannot, in the absence of any allegation of injurious consequences flowing from it, to the plaintiff, or of any attempt to enforce it in any way in the courts of this state, or of any assertion of rights under it here, be made the foundation of an action in this state simply to have such proceeding declared void. *Hill v. Hill*, 23
2. So held in respect to a decree of divorce, obtained in a state court of Michigan, by a wife against her husband; the husband alleging that he was a resident of this state at the time, and that such decree was obtained by his wife fraudulently and unjustly, and without any service of notice of the proceedings upon him. *ib*

DEED.

- 1 A complaint alleged that on or about Sept. 1, 1845, the defendant Mrs. L., then Miss B., in consideration of the sum of \$11,000, conveyed to the plaintiff certain lots of land in the city of New York, with the buildings thereon, and that the deed was duly acknowledged; that the deed remained in the plaintiff's possession more than eight months, when the defendant L. (who had in the meantime married Miss B.) asked permission to look at it; that the plaintiff handed it to him, under a promise that he would return it in a short time; that in October, 1851, L. set up the pretense that the property belonged to his wife; denying that he had ever received a deed from the plaintiff. The plaintiff demanded as relief that the defendants might be directed and decreed to deliver this deed to him, or, in case the same was lost or destroyed, that Mrs. L. might be decreed to execute and deliver a new conveyance of the premises, to the plaintiff. It appeared in evidence that the property in question had previously belonged to the plaintiff; that on the 11th of November, 1844, he conveyed it to D.; and that D. conveyed it to Miss B. June 11, 1845, for the consideration of one dollar, with covenants against his own acts. In order to establish the probability of the conveyance

from Miss B. back to the plaintiff, and of which he now sought the redelivery, the plaintiff asserted that his conveyance to D. and D.'s conveyance to Miss B. were fictitious, and for the purpose of protecting the plaintiff's property from his creditors. There was no proof that the plaintiff exhibited any interest in the property, until his demand of a reconveyance from Miss B. in 1851, except his alleged statement to others that he had received a deed from her, in September, 1845. D. collected the rents for Miss B.; the lots were improved for her, by L., at a considerable expense; and they were mortgaged by Miss B. two years after the alleged reconveyance, and again five years after such reconveyance. In his examination before the surrogate, in 1844, the plaintiff swore that he sold the property to D. on the 10th or 12th of November in that year; that he had received \$10,650 for it, and that there was no understanding between him and D. as to the reconveyance of the premises; and in 1849 he stated to one B. that the sale was *bona fide*, and that Miss B. was the *bona fide* owner of the property. The deed which the plaintiff sought to have delivered up did not purport to have any subscribing witness, and the proof as to the handwriting of the alleged grantor was very slight. The commissioner before whom it was alleged to have been acknowledged had no recollection of the circumstance. *Held* that in the face of these solemn and positive declarations of the plaintiff, it must be very strong and reliable evidence that would warrant the legal conclusion that he did not make a veritable sale to D., and that Miss B. was not the real owner. And that the allegation that Miss B. did, in consideration of \$11,000, convey the property in question to the plaintiff, was not entitled to the benefit of any presumption; but must be strictly and satisfactorily proved, according to the legal rules of evidence. *Moore v. Livingston*, 543

2. *Held also*, that the testimony in the case was not of such force, and so satisfactory, as to justify the court in divesting a person of real property, of which she had been in possession for thirteen years; over which she had exercised independ-

ent acts of ownership, during that period; and of which the plaintiff himself, four years after the alleged execution of the conveyance from Miss B., declared that she was the *bona fide* owner. Judgment rendered at a special term, in favor of the plaintiff, reversed, and a new trial ordered. *ib*

See CERTIFICATE OF ACKNOWLEDGMENT.
LOST DEED.

DEPOSITIONS.

Where it appears, when depositions are offered in evidence, that every reasonable effort has been made, to find the witnesses, to subject them to the process of subpoena; and there is every reason to suppose that they are out of the state, this is sufficient to authorize the reading of the depositions. *Roberts v. Carter*, 462

DESCENT.

See ALIENS.

DIVORCE.

See DECREE.

E

EJECTMENT.

1. In an action, under the code, to recover the possession of real estate, it is only necessary for the plaintiff to allege, in his complaint, that he is seised or possessed of some certain estate or interest in the premises, and entitled to the possession of the same; and that the defendant unlawfully withholds from him the possession thereof. *The People v. Mayor &c. of New York*, 210
2. Where it appears from the complaint, in an action against a municipal corporation and others, to recover the possession of real estate, that the premises are actually occupied by the tenants of the corporation, the complaint shows that the plaintiffs have no right to make the corporation a defendant. *ib*
3. The rule of the revised statutes, that in such a case the tenants in

the actual occupation shall alone be made defendants, has not been altered by the code. *ib*

See ADVERSE POSSESSION.

ESTOPPEL.

Estoppels, as they operate to exclude the truth, must be strictly construed. *Per HOGEBROOM, J. Lounsbury v. Deper*, 41

See PROMISSORY NOTES, 2.

EVIDENCE.

1. Where testimony is offered which is relevant as to one of two defendants but is irrelevant as to the other, it must be objected to by the latter on that ground. If an exception is taken by both defendants, it is not erroneous to overrule it. *Black v. Foster*, 387
2. Where, in an action to recover the possession of personal property, the defendants appear and answer, and claim a redelivery of the property to them, and give an undertaking under the 211th section of the code, in which it is stated that they require a return to them of the property taken, such undertaking is competent testimony to go to the jury to disprove an allegation in their answer that they do not detain the property described in the complaint. *ib*
3. It is for the jury to say how much weight such an undertaking is entitled to and how far it goes to establish the point that the defendants claim to detain the plaintiff's property. *ib*

See DEPOSITIONS.

EXECUTION.

See PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

EXECUTORS.

The plaintiff, as executor, sued W. for a claim due to the testator. When the plaintiff was about to take judgment, the defendant gave his two notes to the plaintiff as executor, in settlement, and the plaintiff, as such executor, assigned a decree which he had obtained, in the surrogate's

court, against W., to the defendant. One of the notes was paid at maturity; when the second became due it was not paid, and the defendant gave to the plaintiff a new note in renewal. *Held*, that the plaintiff could maintain an action upon such new note, in his character as executor, the complaint showing the consideration for the note to be a claim due to the estate, and a promise made to the executor. *Eagle v. Fox*, 473

F

FALSE REPRESENTATIONS.

W. obtained goods from the plaintiff, on credit, upon the representations of R. that he, W., was responsible, and worthy of credit, and owed very little, if any thing. At the time of the sale and delivery of the goods, W. was insolvent and R. knew it. R. himself had a judgment for \$1000 against him, docketed one month previous to the sale. On this judgment R. caused an execution to be issued, and levied upon the goods so obtained from the plaintiff, before they reached the store of W. *Held* that for these false and fraudulent representations R. was liable to the plaintiff for the value of the goods sold to W. *Bean v. Wells*, 466

FOREIGN CORPORATIONS.

See INJUNCTION, 2.

FOREIGN JUDGMENTS.

See DECREE.

FRAUD.

See ARREST, 3, 7, 8.

FRAUDS, STATUTE OF.

1. The statute of frauds does not apply to a contract to make and deliver an article not then in existence, out of materials to be furnished by the manufacturer, where the article is to be constructed in a special manner, and of specified materials, and the price depends upon the quantity of materials used. *Parker v. Schenck*, 38

2. H. signed an agreement, by which he promised to pay A. the rent of certain premises. This agreement was also signed by the defendant, as "security," without any consideration being expressed. *Held* that the case fell directly within the rule laid down by the court of appeals, in *Brewster v. Silence*, (4 *Selden*, 207;) and that, the consideration not being expressed in the undertaking of the defendant, it was void by the statute of frauds. *Gould v. Moring*, 444

G

GIFT.

Where household furniture, belonging to A., was sold under a mortgage given by A. to his daughter, and was bid off by L., who went into the parlor with the plaintiff, (A.'s wife,) and pointed out to her several articles of furniture there, saying, "I give this property to you, and all that I have purchased here this day," but doing no act to deliver the property, or transfer the possession, and the plaintiff doing nothing to express her acceptance of the gift, or of the possession; and the property remained where it was, and continued to be used by A. and his family precisely as it had been used before the sale; *Held* that there was no valid gift of the property by L. to the plaintiff. *Allen v. Cowan*, 99

GUARDIAN AD LITEM.

A guardian *ad litem* for an infant over fourteen years of age should be appointed on the application of the infant, by petition; and the court must be satisfied that the infant has made a voluntary nomination. No person can be appointed guardian, on his or her own application, and without the infant's consent. *E. B. v. E. C. B* 299

H

HUSBAND AND WIFE.

1. At common law, an action by a husband, for the loss of his wife, who was killed by the careless and neg-

ligent act of a third party, can only be sustained where some period intervenes between the time of the injury and the time of her death, during which the husband can be said to have suffered the loss of her services and society, and incurred expense, and endured anxiety and distress on her account. *Green v. The Hudson River Rail Road Company*, 9

2. Where death is the concomitant of the collision occasioning the injury, and life departs at the instant the shock is received, no action for loss of service can be sustained by the husband of the deceased, because there is no time, during her life, when it can be said that the husband has lost the service and society of his wife in consequence of the injury complained of. *ib*

3. A married woman, after her coverture ceases, cannot make a valid legal promise to pay a debt which she incurred during coverture. *Goulding v. Davidson*, 438

4. A wife may confer upon her husband the use or income of her separate property, as a gift; and her acquiescence, or assent to its receipt or use by him, is evidence of a gift by her. *Gage v. Dauchy*, 622

5. Where a married woman, owning a farm, in her own right, goes into the possession of it with her husband, and occupies it, with him and their family; she permitting him to cultivate the land—but without any agreement as to the rents or produce—and to use the proceeds in the support of herself and family, and to sell, exchange and deal with the crops at his pleasure; she thereby confers on him rights which cannot be withdrawn or repudiated when his creditors seek to collect their demands out of property for which he has exchanged the produce of the farm. *ib*

6. Both at law and in equity property thus purchased by the husband belongs to him, and may be seized by his creditors. *ib*

See DEATH BY WRONGFUL ACT, &c.
MARRIED WOMEN.

I

INFANT.

1. Where a complaint set forth an agreement between the parties, by which the defendant promised to take, and vend, certain goods belonging to the plaintiff, and to account to the plaintiff, at certain stipulated prices, for all that he should sell of the same; and that he should receive, for his services, all sums which might be realized upon the sale of the goods, over and above the stipulated prices, and should return to the plaintiff the goods which he might not be able to sell, in good order; but there was no allegation of a conversion; and the complaint, after alleging a demand of the defendant that he would return the goods or account for the avails, pursuant to the agreement, alleged as a breach that the defendant had neglected and refused to account, &c.; *Held* that the action was upon *contract*, and not for a tort; and that *infancy* constituted a good defense. *Munger v. Hess*, 75

2. A finding of a referee, in such a case, that on &c. (before the defendant was of lawful age) the plaintiff demanded of the defendant that he should return the goods, and that the defendant *has not returned them*, is not a finding of a conversion; nor will the facts justify such a finding. *ib*

3. Under such circumstances, there is no ground for the application of the principle of confirmation or ratification, after the defendant became of age; where it does not appear that he did any act whatever, or that any demand was made of him, after he attained his majority; or that the unsold goods were not still in his possession, safe and uninjured, at the time the action was commenced. *ib*

INJUNCTION.

1. A court of equity will not interfere by injunction to restrain a municipal corporation from passing a resolution or ordinance giving permission to a rail road corporation to run steam engines on particular streets

- or avenues of the city, unless in a case where it appears that the mere voting on, and formal passage of, such resolution or ordinance, would instantly, without any action or attempt to enforce any right or privilege under it, effect an irremediable private injury. *Whitney v. Mayor &c. of New York*, 233
2. Before a foreign corporation can rightfully be restrained by the supreme court of this state from issuing bonds, or from executing and delivering a mortgage upon its property, to secure the payment of such bonds, it must appear that the execution of such mortgage would be an injury or obstruction to rights of the plaintiff, which could be enforced in that court. *Rogers v. The Michigan Southern and Northern Indiana Rail Road Company*, 539
 3. Where a party, having an attachment, judgment and execution against a foreign corporation, cannot reach property proposed to be mortgaged by such corporation, because it is beyond the jurisdiction of the court, as a court of law, the supreme court will not interfere, by injunction, to prevent the execution of the mortgage; inasmuch as such mortgage, if executed, will not obstruct or prejudice the plaintiff's rights, as an attaching or judgment creditor, in this state. *ib*
 4. If the plaintiff's judgment, execution and attachment are not liens on the property proposed to be mortgaged, he has no rights or preference, in respect to such property, over other creditors of the corporation, either as a judgment or an attaching creditor, or upon the ground of the alleged insolvency of the corporation. *ib*
 5. And, even if the court had jurisdiction of the property, without such lien, it would be authorized to interfere, by injunction, only in an action by all the creditors, or for the benefit of all the creditors. *ib*
 6. An injunction will not be granted to restrain a defendant from transferring, beyond the jurisdiction of this court, bonds, stocks, securities, and other equitable assets, where the plaintiff has a full and complete remedy at law, under a judgment, execution and attachment. *ib*
 7. The code not prescribing any particular form for the undertaking to be given, under section 222, by a plaintiff upon obtaining an injunction, a penal bond with sureties, to the effect that the plaintiff will pay such damages, not exceeding the amount specified, as the defendants may sustain by reason of the injunction, is a substantial compliance with the requirements of § 222. *Episcopal Church of St. Peter v. Varian*, 644
 8. Where such a bond declares that the three obligors are, and that each of them is, bound to the obligee, the obligation is joint and several. *ib*
 9. Where, in the body of a bond, the obligors were described to be "the corporation the trustees of the town of Westchester, E. H. and R. G. P." and the condition was that "the above bounden" would pay &c. upon a breach; and the conclusion was that "in witness whereof the parties hereunto have set their hands and seals;" and it was signed by "W. V., President of the Board of Trustees; E. H. and R. G. P.;" *it was held* that "the above bounden" meant the trustees of the town of W. and E. H. and R. G. P., and that W. V. was not personally liable, upon the bond. *ib*
- ### INSOLVENT DEBTORS.
1. After an insolvent's discharge is granted, if the officer has acquired jurisdiction, it is conclusive in all other proceedings in which it comes in question. *Rusher v. Sherman*, 416
 2. Objections to it, not relating to the jurisdiction of the officer, cannot be raised collaterally, in an action against the insolvent for the collection of a debt claimed by him to be discharged. If such objections are well taken, the remedy is by a direct review of the proceedings, upon certiorari. *ib*
 3. What steps are necessary to be taken, to give the officer jurisdiction, so as to make his subsequent proceedings, and the discharge of the debtor conclusive. *ib*

4. Where affidavits of petitioning creditors are sworn to before a New York commissioner residing in another state, the certificate of the secretary of state of the latter state, proving the official character of such commissioner, is not necessary to give jurisdiction to the judge before whom the proceedings are pending. *ib*
5. *It seems*, the jurisdiction of the officer may be shown by parol. *ib*
6. On the other hand, although the discharge furnishes evidence of the performance of the jurisdictional conditions, it does not prevent the party assailing it, from showing that the officer in reality had no jurisdiction. *ib*

INSURANCE.

1. Whenever a loss of property insured occurs, and the insurers have notice, and are furnished with the preliminary proofs required by the conditions of insurance, the amount of the loss becomes, by force of the contract, a debt, payable to the insured presently or at the time appointed in the policy. And whenever the right of property in the debt thus attaches and becomes perfect, all the incidents of property attach, also, including the power of sale and disposition. *Courtney v. The New York City Insurance Company*, 116
2. Hence a condition, annexed to a policy of insurance and forming a part of the contract, the purpose of which is to prevent a sale and assignment of the debt by the assured, after the same has accrued and the right to it has become perfect, is void, *it seems*; and cannot be enforced, for the reason that it is repugnant to the principal object of the contract. *ib*
3. The reasoning and conclusion of the court upon this point, in *Goit v. The National Protection Ins. Company*, (25 Barb. 189,) approved. *ib*
4. A condition, declaring that policies subscribed by the insurers shall not be assignable before or after a loss, without their consent, indorsed thereon; and that in case of assignment without such consent, whether

of the whole policy or of any interest in it, the liability of the assurers in virtue of such policy shall thenceforth cease, is to be construed to mean their liability as insurers, for losses to accrue thereafter, and not for losses which have already accrued. *ib*

5. If, after a loss has occurred, the assured, by deed of assignment, sells, assigns and transfers to another the debt, demand and right of action which have accrued to him in consequence of the loss by fire, the policy, and the contract to insure in future, will not pass by the assignment; but the right of action for the debt or demand will pass to the assignee, who may sue thereon. *ib*
6. Conditions annexed to a policy of insurance are a part of the contract, and have the same effect as though written in the body of it; and when a condition, thus forming a part of the policy, is not complied with, the assured cannot recover in case of loss. *Jube v. The Brooklyn Fire Ins. Company*, 412
7. Where a policy contained a condition that the assured should produce, if required by the assurers, his books of account and other vouchers in support of his claim, and permit extracts and copies to be made; and that until such proofs &c. were produced, or if they were refused when demanded, the loss should not be payable; and being required by the assurers, after a loss, to produce his invoices or bills of goods purchased, or duplicates thereof, he told them it was impossible to do so; that he had only found a few bills; and although he afterwards found others, he did not produce any to the assurers, but, on being required to furnish further statements and the bills of purchase, he, acting under the advice of counsel, declined to do so; *Held* that no recovery could be had, upon the policy. *ib*

INSURANCE COMPANIES.

1. A certificate, by examiners appointed by the comptroller, under section 11 of the act of April 10, 1849, relative to the incorporation of insurance companies, stating that they have

- made an examination, and found that a mutual insurance company "has received, and is in actual possession of capital, consisting of premium notes, to an amount at least equal to the amount required by said act, to wit, the sum of \$100,000;" and that from the best information they are able to obtain, they are "satisfied that the said notes are valid, for the purposes specified in the 5th section of said act," is substantially in conformity with the requirements of the 11th section of said act, and is sufficient. *Hart v. Achilles*, 576
2. And if the comptroller, after reciting the report of the examiners, certifies "that the said company is possessed of an amount of capital equal to the amount specified" in the 5th section of the statute, this, also, is sufficient in point of form. *ib*
 3. A promissory note, given to a mutual insurance company about to be formed, for the amount of an insurance to be consummated by the company upon its organization, by which the insured promises to pay to the company the sum specified, in such proportions and at such times as the directors of the company may, agreeably to the charter and by-laws, require; such note being made for the purpose of complying with the provisions of the act of April 10, 1849, relative to the incorporation of insurance companies, and of constituting a part of the capital stock; is payable absolutely, and can be collected by a receiver of the company upon its failure. *ib*
 4. The act of April 10, 1849, does not authorize the formation of insurance companies upon the mutual, and the stock plans, combined. *ib*
 5. Hence a company, organized under that act, cannot accept premium notes from a portion of its customers, and cash premiums from the remainder; and then assess the premium notes to pay losses occurring in either department. *ib*
- son jointly liable with him for the debt shall be made a co-defendant. The omission, by the plaintiff, to sue all the joint contractors, may be set up as a defense, in the answer, and is a complete defense to the suit. *Wooster v. Chamberlin*, 602
2. If the answer, setting up such a defense, is defective, in not averring that the other joint contractor is still living, the defect may be cured by the proof, on the trial. *ib*
 3. After full proof of the answer, and of all the facts essential to sustain the defense, without objection, it is too late to overrule the answer on the technical ground that it does not contain the averment that the joint debtor omitted to be joined as a defendant is still alive. *ib*

JOINT STOCK ASSOCIATIONS.

1. The recovery of a judgment against a joint stock association merges the original debt, and after redress has been sought by the creditor against the property of the association, and has failed, the shareholders become liable for the amount of the judgment, including the costs incurred in obtaining it. *Witherhead v. Allen*, 661
2. The case of *Bailey v. Bancker*, (3 Hill, 188,) so far as it relates to the liability of shareholders for the costs of obtaining judgment against an association, must be regarded as limited to the particular statute then under consideration. *ib*

See PLEADING, 10, 11.

JUDGMENT.

See DECREE.

JURISDICTION.

1. When a nuisance occasions, or is likely to occasion, a special injury to an individual, which cannot well be compensated in damages, equity will entertain jurisdiction of the case. *Milbau v. Sharp*, 228
2. The supreme court, as now consti-

J

JOINDER OF PARTIES.

1. It is the right of a party who is sued, to require that any other per-

tuted, has common law jurisdiction to partition real estate. *Canfield v. Ford*, 336

See INJUNCTION.
PARTITION.

JUSTICE OF THE PEACE.

1. A judge, or a justice of the peace, cannot sit as such in a cause to which a corporation is a party, if he be related to a stockholder in such corporation. (*BALCOM, J.* dissenting. *Place v. The Butternuts Woolen and Cotton Manuf. Company*, 503)
2. The defendant may prove the existence of such relationship, although there is no plea to the jurisdiction of the justice, or answer setting up the fact to be proved, in order to deprive the justice of jurisdiction. *ib*
3. Where a defendant, in a justice's court, is a non-resident of the county in which the justice resides, the justice will acquire no jurisdiction of his person by the service of a summons issued by him returnable more than four days from the date. *Wilkins v. Wheeler*, 669
4. Such a fatal defect in jurisdiction as that, cannot be cured by a mere omission to take the objection. The defendant, upon such a service, is never in court at all, nor in the jurisdiction of the magistrate; and he is not bound to do, or say, any thing in the premises. *ib*
5. If the objection is not taken before the justice, the defendant may raise it in the county court, on appeal. *ib*
6. Such a defect in the process by which jurisdiction should be acquired is an error in fact. *ib*
7. A fact outside of the record, which renders the judgment void, and which, when properly alleged and proved in any action or proceeding in which the judgment comes in question, will defeat any title or right claimed under it, is sufficient to reverse the judgment, in a direct proceeding for that purpose. *ib*

L

LEASE.

See ADVERSE POSSESSION.

LEGAL PROCEEDINGS.

See ATTACHMENT, 3.

LIBEL.

In an action for slander, or libel, the pecuniary circumstances of the defendant are not involved in the issue, and evidence showing him to be rich or poor ought not to be received. *Palmer v. Haskins*, 90

LOST DEED.

1. In cases of the alleged loss of a deed, the law requires the greatest exactitude of proof. It requires incontrovertible evidence of the existence of the instrument; of its execution and delivery, by the subscribing witness; and if there is no subscribing witness, the most satisfactory proof of the genuineness of the grantor's signature. *Moore v. Livingston*, 543
2. If the handwriting of the alleged grantor is not sufficiently proved, the mere production of an instrument purporting to be signed by him, and proof of its subsequent loss, can be of no avail to the party claiming under it. *ib*

M

MARRIAGE.

1. In all actions brought to obtain a dissolution of the marriage contract, it is the duty of the court scrupulously to guard the proceeding from being used by the parties collusively, and not to suffer a judgment therefor without being fully satisfied that the cause specified in the statute really exists. *E. B. v. E. C. B.* 299
2. Whenever facts are placed before the court which create suspicion that there is collusion between the parties—especially when the defendant is a female under the age of 21

years—it is the duty of the court at once to institute such an examination as will satisfy them that no collusion exists. And if necessary, the court will order a reference for that purpose. *ib*

MARRIED WOMEN.

1. The acts of 1848 and 1849 "for the protection of married women," entirely abrogate the existence of prospective tenancy by the curtesy, and were intended to do so. *ROSEKRANS, J.*, dissented. *Billings v. Baker*, 343
2. Every quality and incident that is necessary to constitute a tenancy by the curtesy is destroyed by the provisions of those acts. *ib*
3. The husband cannot now be seised of the estate, during the life of the wife. It is not alienable by the husband. It is not liable for his debts. The estate cannot *vest* during the life of the wife. And as there is no *initiate* estate at her death, there is no estate to be consummated. *ib*
4. Those statutes are remedial in their nature, and should be construed with a view to the advancement of the remedy. The courts should look at the precise words used in the statute, and then construe them in their ordinary sense, unless such construction would lead to an absurdity or manifest injustice. *ib*
5. Before those statutes, the right of married women to hold separate estates, independent of their husbands, was recognized as a part of the common law. *ib*
6. The plain language of the statutes themselves expressly negatives any other construction than an abrogation of the estate of curtesy. *ib*
7. The *intent* of a remedial statute, like the intent of an agreement, is to be gathered from the plain language employed in it. *ib*
8. In giving construction and effect to the statutes of 1848 and 1849 as to the personal estate of married women, the common law or statutory right of the husband when those acts

were passed, even to the choses in action of the wife not reduced into possession in her lifetime, should be considered as one of his marital rights, commencing with the marriage, continuing in him during their joint lives, and surviving on her death. *Vallance v. Bausch*, 633

9. And courts are to presume that the legislature passed those acts with a knowledge of the husband's common law rights, and that those rights were not intended to be taken away, any further than was necessary to secure to married women, as against their husbands, the free, sole, separate use and enjoyment and absolute disposition of their property. *ib*
10. It was not the intention of the legislature to abolish, or change prospectively, the husband's right of succession to his wife's undisposed of personalty. *ib*
11. Where a married woman, who was the owner of certain personal property, made her will, in 1856, and died in 1857, leaving no children, but leaving her husband, and her mother, her surviving; *Held* that her mother had no right to attend as her next of kin, at the probate of the will, and file objections thereto, or be heard in the premises; she having no interest in, or right to, the goods, chattels and credits whereof the testatrix died the owner and in possession; but that the same belonged, after due administration, to the husband who offered the will for probate. *ib*

MORAL OBLIGATION.

See AGREEMENT, 3.

MORTGAGE.

1. Where a mortgage contains a condition that in case of the failure of the mortgagor to pay the interest at the time when the same becomes due, or within a certain number of days thereafter, the principal sum shall become due and payable immediately; and the mortgagor, through his own neglect to pay the interest, suffers the whole mortgage debt to become due according to

- the terms of the mortgage, the court cannot interfere to relieve him from the payment thereof, or alter the terms of the contract. *Ferris v. Ferris*, 29
2. A condition of that nature, in a bond and mortgage, is not a forfeiture, or a penalty. *ib*
3. Where A. executed to his daughter a mortgage upon his household furniture, to secure the payment of a debt alleged to be due, for money lent, but there was no immediate and continued change of possession of the property, the same remaining in the house of the mortgagor for more than two years, and being used by his family, during that period, in the same way it was used before the mortgage was executed; *Held* that as between a person claiming title to the property under the mortgage, and one representing a judgment creditor of the mortgagor, the circumstances called for *some evidence* that the mortgage was made in good faith, and without any intent to defraud the creditors of A. *Allen v. Cowan*, 99
4. And that if no such evidence was given, the conclusive statute presumption of fraud stood in the way of a recovery, by a person claiming the property through a purchaser at a sale under the mortgage, against a sheriff who had levied on the same by virtue of an execution against A.; and called upon the court to nonsuit the plaintiff. *ib*
5. Under such circumstances, until *some evidence* of good faith is given, the law adjudges the mortgage void as to creditors, and the jury has nothing to do with the question. *ib*
6. When *any evidence* is furnished, to affect this statute presumption, and from which a jury may lawfully find that such presumption is overcome, then, and not until then, must the case be submitted to the jury. *ib*
7. The evidence which the party claiming under the mortgage, in such a case, is called upon to give, must have reference to the consideration of the mortgage, and the motives of the parties in making it. *ib*
8. A mortgage creditor can, in the lifetime of the mortgagor, either sue upon the bond, or foreclose the mortgage; and he has the right after the death of the mortgagor, at his option, either to sue the heirs of the mortgagor, upon the bond collateral to the mortgage, or to foreclose the mortgage. *Roosevelt v. Carpenter*, 426
9. The mortgagee is not confined, in the first instance, to his remedy by the mortgage, against the mortgaged premises; but he may, without waiting to exhaust that remedy, resort at once to his remedy upon the bond, which the statute gives him against the heirs, and all the real estate which they take by descent. *ib*
10. Where an action is brought upon the bond, against the heirs of the mortgagor, in the name of the mortgagee, but for the benefit of a grantee of the heirs of the mortgaged premises, proof that it was represented to such grantee, at the time of his purchase, by the grantors, that the premises were only subject to a mortgage specified, the amount of which was deducted from the purchase money, and the balance paid by the purchaser, who understood that there was no other mortgage; when in fact the mortgage accompanying the bond sued on, was also a lien on the premises, at that time, is admissible, and should be received. *ib*

See CERTIFICATE OF ACKNOWLEDGMENT.

MUNICIPAL CORPORATIONS.

See ATTORNEY GENERAL.
INJUNCTION, 1.
NEW YORK, (CITY OF.)

N

NEGLIGENCE.

1. In an action to recover damages for the defendant's neglect in conducting the repairs of a house, in consequence of which the plaintiff, while passing by, was struck by a falling timber and injured, where the defense is, negligence on the part of

- the plaintiff contributing to the injury, and the absence of negligence on the part of the defendant, the true question to be put to the jury is, Did the defendant take proper precautions to prevent the injury? in other words, Was he guilty of negligence in not observing proper precautions? *Vanderpool v. Husson*, 196
2. It is error, in the judge, to *limit* the expedients to be resorted to by the owner of the building, by instructing the jury that where, in conducting such repairs, a derrick is necessarily extended over the side-walk where people are passing, it is the duty of the owner to cause a barricade to be placed, to prevent people from passing by; or to place a person there, to give warning to passers by. *ib*
 3. The general rule is that where work is done under a contract, and an injury to an individual occurs from the act or negligence of the servants of the contractor, the owner of the property is not responsible. *ib*
 4. To this general rule there are exceptions; as where the work or erection is itself a *nuisance*; or where the injury was a necessary result of the contract, &c. *ib*

See RAIL ROADS.

NEW TRIAL.

Where it is apparent, from the whole case, that the plaintiff can in no event recover any thing but nominal damages, the court will not grant a new trial, although an error has been committed in the charge. *Tibbles v. O'Connor*, 538

NEW YORK, (CITY OF.)

1. The resolution passed by the common council of New York in January and February, 1857, authorizing the comptroller to purchase certain land of Robert W. Lowber, for the purpose of a market, was within their powers as conferred by the city charter. And in passing such resolution the common council did not violate any of the restrictions con-

tained in the charters of the city. *People v. Lowber*, 65

2. The common council of New York may order land to be purchased, for a market, notwithstanding the limitation in the charter as to the yearly value of land which the corporation may hold. *ib*
3. The pre-emption right in lands under water, which by the act of 1837, establishing the 13th avenue in the city of New York, was given to the proprietors of adjacent lands previously granted by the mayor &c. is not a personal independent right of the grantee of previously granted adjacent premises, capable of separate, independent conveyance; nor is it strictly an incident or appurtenant of such premises, but is an incident of the grantee's estate and proprietorship in such premises; and will pass from him, with such estate, by a sale of the premises under a mortgage executed by the grantee. *Warwick v. Mayor &c. of New York*, 210
4. Where a statute conferred the appointment of clerks of the district courts in the city of New York upon the mayor and the members of the board of aldermen, or a majority thereof, and directed the meeting for that purpose to be in convention, and prescribed the mode in which such convention should be called together, and declared that it should not be lawful for the aldermen to proceed to make appointments in the absence of the mayor, unless after a notice to him of eight days, of the time and place of meeting; *Held* that this was a clear legislative declaration that notice should be given to all who legally composed the convention, before those who did attend should be authorized to proceed, in their absence, to act; and that in a case where five members of the body were not summoned to attend the meeting, and had no notice thereof, such omission was fatal to the legality of the meeting, and vitiated appointments made by those who did attend, although the members present constituted a majority of the whole number. (INGRAHAM, J. dissented.) *People ex rel. Loew v. Batchelor*, 310

NUISANCE.

When a nuisance occasions, or is likely to occasion, a special injury to an individual, which cannot well be compensated in damages, equity will entertain jurisdiction of the case. *Milbau v. Sharp*, 228

P

PARENT AND CHILD.

It seems, that the mother, after the death of the father, has no right to the services of a minor child, and is not liable for its support. *E. B. v. E. C. B.*, 299

PARTIES.

A stockholder in a corporation is a *party* to a suit brought against such corporation. (BALCOM. J. dissenting.) *Place v. Butternuts Woolen and Cotton Manuf. Company*, 503

PARTITION.

1. Where a deed conveyed to the grantee, and to his heirs and assigns forever, all the mines, ores, minerals and metals in or upon certain lands described therein, together with the right to raise, work and carry away the same; and the right to put up all buildings, and to use all lands that might be necessary for the purpose specified; and the right of ingress and egress thereto, and therefrom, for the purpose of digging and working and carrying away said mines, ores, minerals and metals; and all the estate &c. of the grantors of, in, and to the said mines, ores, minerals and metals; to have and to hold the said mines, ores, minerals and metals, to the grantee, his heirs and assigns for ever; *Held* that the estate conveyed was an estate of inheritance, and was such an interest as comes within the intent and meaning of the provisions of the revised statutes relative to *partition*; and that an action would lie for the partition of such interest. *Canfield v. Ford*, 336

2. The supreme court, as now constituted, has common law jurisdiction to partition real estate. *ib*

3. In a suit between tenants in common, for the partition of an interest in real estate, which has been carved out of the fee, the owner of the fee who is the common source of title to all the tenants in common, is not a necessary party. *ib*

See TENANTS IN COMMON.

PARTNERSHIP.

See DEBTOR AND CREDITOR, 4 to 8.

PLEADING.

1. *Complaint.*

1. A complaint asking for relief to the plaintiff individually; or, if that cannot be granted, then for relief in respect to the same subject matter, to him and other persons as tax-payers, is bad on demurrer. *Warwick v. Mayor &c. of New York*, 210

2. Where a complaint contains a good cause of action against several defendants, who are partners, upon contract, and prays judgment therefor, it is not rendered demurrable by going on to allege the insolvency of the defendants, and the confession of a judgment by them to defraud their creditors; and asking for an injunction and a receiver. *Meyer v. Van Collem*, 230

3. If a complaint, in addition to the statement of a good cause of action, contains unnecessary and improper matters, the remedy of the defendant is to move to have the improper matter stricken out. *ib*

4. What are good causes of demurrer to a complaint for want of form. *People v. Mayor &c. of New York*, 240

5. A joint demurrer to a complaint, by several defendants, will be overruled if the complaint shows a cause of action by the plaintiffs, or a portion of them, against some of the defendants. *ib*

6. A complaint alleged that the defendant, being desirous of purchasing

- flour, for shipment abroad, but not being able to make such purchases in his own name, he applied to C. for leave to make purchases in C.'s name; and that it was agreed between them that the defendant might make such purchases in the name and upon the responsibility of C., and that he should pay to C. the amount thereof, *so as* to save C. harmless by reason of such purchases. That the defendant accordingly bought in C.'s name, flour to the amount of \$86,939.20; all of which the defendant received and shipped in his own name, and had the benefit of, and for which he promised to pay C. That \$3500 remained unpaid to C. That C. had assigned his claim to H., who had assigned the same to the plaintiff. *Held*, on demurrer, that the action was not upon an agreement to *save C. harmless*; but that the legal effect of the arrangement was that C. bought the flour, by the defendant as his agent, and let the defendant have the same, who paid C. for it, with the exception of \$3500. *Hay v. Hall*, 378
7. *Held also*, that it was not necessary for the plaintiff to allege that C. had paid for the flour, or had sustained any other damage than the non-payment of the \$3500 by the defendant. Demurrer overruled. *ib*
8. A complainant, after alleging the existence of Antioch College, and its incorporation, averred that on the 29th of June, 1857, the said college made an assignment of its estate, &c. to the plaintiff, by which he was empowered to sue for and collect all the debts of the college and apply the proceeds in payment of the creditors of the corporation. That on the 5th of April, 1851, the defendant made his promissory note for the sum of \$100, payable &c. and delivered the same to the said Antioch College; that the note had never been paid; that it was now in the possession of the plaintiff, as the property of the college, which was the lawful owner and holder thereof, &c.; *Held*, on demurrer, that the complaint was defective, in its method of stating the ownership of the note. *Palmer Smedley*, 468
9. The same complaint also alleged, that on, &c. the defendant became a subscriber to the stock of Antioch College, to the amount of \$100, payable &c.; that the same had never been paid, and that there remained due and owing to the said college the amount of said subscription, with interest. *Held* that in respect to this cause of action the complaint was also bad for want of an averment of indebtedness to the plaintiff, or of any right shown, on his part, to demand of the defendant the money therein mentioned. *ib*
10. Where, in an action against ten persons as members of a joint stock company or association, the complaint averred that the defendants were all shareholders in said association, during the year 1857; that while they were such shareholders, the company became indebted to the plaintiff, for goods sold to the association, to the amount of \$162.51, and an action was commenced, on such demand, against the association, by the service of a summons and complaint personally, on its president; judgment obtained for \$178.12 damages and costs; and execution issued and returned unsatisfied; *Held* that this was a good complaint, and contained all the facts necessary to show a good and perfect cause of action against the defendants; and that a demurrer for insufficiency was clearly frivolous. *Witherhead v. Allen*, 661
11. *Held also*, that the court was authorized to render judgment against those defendants who joined in the demurrer, without including those with whom they were impleaded. *ib*
12. In an action by a receiver, it is not necessary for the plaintiff, in his complaint, to set out all the proceedings by which he was appointed. It is sufficient if he states the mode of his appointment. *Stewart v. Beebe*, 34
13. Thus where the complaint showed the plaintiff to be receiver of the Bowery Bank, appointed by the supreme court, by an order made on a specified day, on condition of filing security; and that such security was given accordingly; *Held* that enough was stated to enable the defendant

to take issue upon the legality of the plaintiff's appointment, if he chose to do so. Demurrer overruled. *ib*

14. In an action to recover damages for the non-performance of a contract for the purchase of stock, it is not necessary for the plaintiff to allege, in his complaint, that he was the owner of the stock at the time of making the contract, or that the contract was in writing. *Washburn v. Franklin*, 27

2. Answer.

See JOINDER OF PARTIES.
VARIANCE.

3. Generally.

15. Facts may be averred, in a pleading, according to their legal effect; but facts appearing on the trial, directly different from those averred, will be deemed a variance, although, if properly pleaded, they would also have constituted a good defense. *Gasper v. Adams*, 441

See CORPORATION, 1 to 4.
CREDITOR'S SUIT.
EJECTMENT, 1, 2.
INFANT, 1.

POWER.

1. Where a power is to be exercised by several persons, a majority of the whole number may proceed to act, and their action will be legal, provided all the members composing the body are summoned to attend, or have notice of the time and place of meeting. *People, ex rel. Loew, v. Batchelor*, 310
2. The right to have such notice is one which the majority cannot take away from the minority. All comprising the body are entitled to reasonable notice of the time and place of the meeting; and if all are summoned, or have notice, a majority attending may proceed to act, and the majority of that quorum will bind the whole body *ib*

PRACTICE.

1. A statement of the evidence, or a comment upon it or its effect; an

assumption of a fact in the cause; or a mere reference to what is established by the evidence, by a judge in his charge to the jury, are not grounds of exception to the charge. *Dowes v. Rush*, 157

2. A party who is dissatisfied with the expression of an opinion, by a judge upon a question of fact, or the conclusion at which he arrives in regard to it, must express that dissatisfaction, not by excepting to the charge of the judge on that point, but by asking to have the question of fact submitted to the jury for their determination. *ib*
3. An exception to the charge, on the ground that a particular question should have been submitted to the jury as a question of fact, is not a compliance with this rule; where the judge has made no charge to the contrary, nor been requested to submit the question to the jury, and has not refused to do so. *ib*
4. An exception to the charge, in such a case, is not equivalent to a request to the judge to submit the question, and a refusal to do so. *ib*
5. A general exception to the whole charge, and to each and every part thereof, raises but a single exception to the entire charge, and is unavailable if any portion of it be correct. *ib*
6. Whether it is sufficient, within this rule, for a party to except to the charge "and to each part thereof separately and distinctly?" *Quare. ib*
7. Where a verdict is taken for the plaintiff, subject to the opinion of the court, if there are exceptions in the case, upon which either party has a right to be heard, on a motion for a new trial, the court cannot give judgment for the defendant, on the verdict, but the verdict will be set aside as for a mis-trial. *Beebe v. Ayres*, 275

PRINCIPAL AND AGENT.

1. Although it is settled law that a principal is not liable to a servant for injuries sustained by reason of

the negligence of another servant, when both are engaged in the same general business, in the service of the principal, yet it is the duty of the master, to all his servants, to use reasonable care in providing them with careful and competent fellow servants; and he is liable for injuries to any servant arising from his neglect to use such care; in the absence of proof that the injured servant was aware of the incompetency of his fellow servant. *Wright v. New York Central Rail Road Company*, 80

2. The power to employ servants may be delegated by the principal; especially when the principal is a corporation. When the principal thus acts by an agent he will, upon general principles, be liable for the negligence of the agent. Such agent will not be regarded simply as a fellow servant of those whom he employs in the general business. *ib*
3. One who executes a contract as the agent of another, without authority, is himself primarily responsible as a contracting party. But in order to fix and enforce this personal liability, it must appear that the party sought to be charged signed as agent—that is, professed to act for another—and that such act was without authority. *Episcopal Church of St. Peter v. Varian*, 645
4. Where a corporation having authority to sue and be sued, commences an action, in pursuance of a resolution of the board of trustees, and its president, for the purpose of obtaining an injunction therein, executes the undertaking required by section 222 of the code, in his official character—not professing to act as the agent of the corporation—the instrument will be regarded as the act of the corporation itself, and not the act of the president as its agent; and the officer will not be bound thereby. *ib*

See INJUNCTION, 9.

PRINCIPAL AND FACTOR.

See BILL OF LADING, 6.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

Proceedings supplementary to execution may be taken, under section 294 of the code, against a foreign corporation. *McBride v. Farmers' Bank of Salem*, 476

PROMISSORY NOTES.

1. Where a promissory note was shown to have been in the possession of, and owned by, the payee within four or five days of his death, and there was no evidence of any transfer thereof by him, in his lifetime, but about two weeks after his death his widow was in possession of it, claiming it as her own, and she subsequently negotiated it to the plaintiff; and it appeared that the payee died intestate and indebted, and no letters of administration had been issued: *Held* that it was to be inferred, from these circumstances, that the note belonged to the payee, at the time of his death, and that his widow, not being his legal representative, nor the owner of the note, had no right to transfer the same to the plaintiff. *WRIGHT, P. J.*, dissented. *Lounsbury v. Depero*, 44
2. *Held also*, that the defendant was not *estopped* from setting up a want of title in the plaintiff, by the fact of his having made payments upon the note, while it was held by the widow, and to the plaintiff after it came into his hands, some of which payments were indorsed upon the note by the defendant in his own handwriting. *WRIGHT, P. J.*, dissented. *ib*
3. Promissory notes, without consideration, given by a parent to his children, in his lifetime, cannot be enforced against his estate, after his death. *Phelps v. Phelps*, 121
4. The payment of the interest on such notes, to the payees, by the maker, for two or three years before his death, will not make the notes valid against his estate. *ib*
5. A person can *give* goods, chattels or money, but not his own promises, so that they can be enforced. *ib*

R

RAIL ROADS.

Individuals owning lots fronting on a public street of the city may maintain an action to enjoin the construction in such street of a railway, which would be specially injurious to their property. *Milbau v. Sharp*, 228

See INJUNCTION, 1.

RAIL ROAD COMPANIES.

1. Where individuals, as president and secretary of a rail road company, acting for the company, contracted with the plaintiff for the construction of station buildings, for the company, and assigned to him, in part payment, an agreement between the company and the defendant; and the company, after the buildings were erected, occupied the same, thereby recognizing those persons as their officers, and their authority to do what they had done; *Held* that the official character of those persons and their authority to assign the agreement in behalf of the company, were sufficiently proved. *Kennedy v. Colton*, 59

2. Where the defendant, with others, subscribed a writing, by which, in consideration that a rail road company would construct a depot, &c. for the accommodation of travelers, at B., he agreed to pay the company \$50, for the purpose of aiding in making said depot and establishing and improving public roads to and from the same; *Held* that the instrument imported a request to the company to construct the buildings and establish and improve the roads; and that a compliance with the request, by the company, so far as to construct the depot, was a sufficient consideration for the defendant's undertaking. *ib*

3. In an action against a rail road company, brought by a brakeman in its employ, to recover damages for an injury sustained by means of a collision, it is not erroneous for the judge to charge the jury that it was the duty of the defendant to

use reasonable care, in order to employ an engineer of competent skill and experience; and that if they find that ordinary care was not used, in providing the engineer on the occasion of the collision, and the injury to the plaintiff was occasioned by such negligence, the defendant is liable for the consequences. *Wright v. New York Central Rail Road Company*, 80

4. It is negligence in a rail road company so to arrange its time-tables as to permit trains approaching a station from opposite directions, on the same track, to reach the station at the same moment. *ib*

5. And this, although one of the trains is directed to run off upon a side track, at the station; if experience shows that there is danger, especially in a dark night, of a train running past the switch at the station, and thus coming in collision with the other train. *ib*

6. A payment in money, *eo nomine*, at the time of subscribing to the capital stock of a rail road company, is not necessary to the validity of the subscription, under the 4th section of the general rail road act, which requires the payment of ten per cent in money, by each subscriber, at the time of subscribing. A subsequent payment will operate as a waiver of the condition, and the party making it will be considered as recognizing his original liability. *Beach v. Smith*, 254

7. Where a party, while engaged as an agent of a rail road company, in procuring subscriptions to the capital stock, receiving the first payment of ten per cent thereon, and performing other services for the company, for which it was indebted to him, made a subscription of \$500 to the capital stock, on his own behalf, without, however, in form, paying the ten per cent thereon, to himself or any one else, at the time, but subsequently, on calls for installments being made, by the directors, he presented an account to the company, making a charge of \$450 for his services and expenses as agent, and crediting the sums paid to him by the subscribers to the stock, and also the original ten per cent on his

- own subscription, and the amount of a call of ten per cent then payable, and struck a balance against the company of \$200, which account was allowed, and the balance paid to him, by the treasurer; *Held* that under the circumstances, it was not necessary for the party to pay to himself, as agent, ten per cent, at the time of subscribing, in order to render his subscription valid and binding; but that if there were any defect in such subscription, he, by his subsequent conduct ratified the subscription and recognized his continuing and existing liability thereon, and was bound thereby. (W. F. ALLEN, J., dissented.) *ib*
8. Where the regulations of a rail road company require the conductors upon each division of the road, on starting with each train, to examine the tickets of the passengers and tear off from a corner thereof the letter indicating that division, and if a passenger desires to stop over, at any point, the conductor is authorized so to indorse his ticket as to secure his passage from that point to the end of the division; but if the ticket is *not* so indorsed, other conductors on the same division are to disregard it and collect fare, or put the passenger off the cars; if a passenger, after entering upon a particular division and having the letter appropriate to that division torn off his ticket, stops over at a station without giving notice to the conductor, or asking him to make the proper indorsement upon his ticket, and, the next day, proceeds upon his journey, on another train, and presents the ticket, thus mutilated and without indorsement, to the conductor, the latter is not bound to receive the same; but will be justified in collecting the fare of the passenger, or in putting him off the cars, upon his refusing to pay. *Beebe v. Ayres*, 275
9. Such a regulation is a reasonable one, and is necessary, in order to guard against fraud. *ib*
10. If a passenger chooses to stop and lie over, it is not unreasonable to require him to procure his ticket to be so indorsed as to make it a voucher to the conductor having charge of a subsequent train. *ib*
11. Under such a regulation, the rule of evidence is prescribed to the conductor. What is written or printed upon the ticket is the only evidence he has any right to take. If the letter indicating the passenger's right to ride upon a particular division is torn from the ticket, it is evidence to the conductor that the holder has ridden over that division; and the latter has no right to supply what that letter indicated, by parol proof. *ib*
12. In such a case it is not necessary to prove that the passenger knew the object of divesting the ticket of its corners. He will be presumed to have purchased his ticket with reference to the regulations of the road. *ib*
13. In a case free from fraud, a receipt, given by a common carrier, for a barrel, box, trunk or other article, shown to be hollow and to contain goods, means that the party who executes it has received the contents of the barrel, &c. as well as the barrel itself. *Harmon v. New York and Erie Rail Road Company*, 323
4. Accordingly, where the agent of a rail road company, at New York, signed a receipt for a lot of furniture, among which was specified, "1 cradle," which had a carpet wrapped around it, bound with cords, and contained a valise with wearing apparel in it, which furniture was to be forwarded to Owego; and the agent was informed what the cradle contained; *it was held* that the company was bound to carry not only the cradle, but also the goods then in it, to Owego; and was liable for the loss of the goods. (GRAY, J. dissented.) *ib*
15. Where goods are delivered to a carrier, marked for a particular destination, without any directions as to their transportation and delivery, save such as may be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged. *Hempstead v. New York Central Rail Road Company*, 485

16. The plaintiff and his assignors delivered to the Union Express Company, at Detroit, 319 kegs and 15 barrels of butter, to be transported to D., A. & R., Front street, New York. The packages were all marked "J. A. B., 17 Water street, New York." The butter had been shipped from Chicago to Detroit, consigned to B., New York, and marked "J. A. B." At Detroit B. transferred his interest to N. & H., and by them the consignment was changed to D., A. & R., New York. The Union Express Company received the butter, at Detroit, for transportation, and delivered the same to the Great Western Railway Co., to be carried by them to Suspension Bridge, in pursuance of a standing agreement for the transportation by the said rail road company of such freight as the Union Express Company should deliver to them for transportation. That company way-billed the butter to the consignees, carried it to Suspension Bridge, and there delivered it to the defendant, a common carrier of freight between Suspension Bridge and Albany, and took receipts. No other contract was made by the defendant, in respect to the transportation of the butter, except that implied from the receipt, and the fact that the butter was delivered to the defendant. The defendant made freight way-bills of the butter, which showed that the butter was in care of the Union Express Company. A part of the kegs had D., A. & R. as consignees, and 142 kegs and 15 barrels had as consignee "J. A. B., New York." The defendant carried the butter safely over its road to Albany, and delivered the same to the Hudson River Rail Road Company, a responsible carrier of freight between New York and Albany. The packages marked "J. A. B." were never delivered to D., A. & R. No express contract, by the defendant, to carry the butter to New York, was either alleged or proved. The court found that the defendant was a common carrier of freight from Suspension Bridge to Albany, but that it did not contract as a common carrier to transport the butter to New York and deliver the same to D., A. & R. The defendants, however, had notice

that D., A. & R. were the consignees. *Held*, 1. That by the delivery of the property to the Hudson River Rail Road Company, the liability of the defendant terminated, unless it omitted to give the necessary instructions to the latter company as to the delivery of the property. 2. That the defendant must be held to know who the consignees were, and it was bound to communicate that information to the Hudson River Rail Road Company; and that a failure to do so would subject the defendant to such damages as should result from its neglect. 3. That in the absence of any proof upon that subject, it must be presumed that the defendant accompanied the delivery of the property to the Hudson River Rail Road Company with all such instructions as the law required to be communicated; and that an action against the defendant as a common carrier, to recover damages for the loss of the butter, could not be sustained. 4. That upon the delivery of the property to the Hudson River Rail Road Company, the liability of the defendant, as a common carrier, ceased, and its further liability, if any, was as a forwarder. What must be averred, and proved, in an action against a rail road company as a forwarder, under such circumstances. To enable a party to recover against a rail road company, that would not otherwise be liable, under section 53 of the general rail road act, (1 R. S. 4th ed. p. 1210,) the liability must be averred in the complaint. If no such case is contemplated at the time of commencing the action, or stated in the complaint, the whole nature and form of the action cannot be afterwards changed, in order to make the defendant liable under that section. 16

See CARRIER.

RECEIVER.

See CHATTEL MORTGAGE.
PLEADING, 12, 13.

REFEREE.

1. The court will not interfere with the finding of a referee upon a question

of fact, as to which there is conflicting testimony; unless the clear weight of evidence shows that he has erred. *Watson v. Campbell*, 421

2. The report of a referee should state the facts found, and the conclusions of law, separately. *Roberts v. Carter*, 462

3. Where the evidence, on a hearing before the referee, is conflicting, it presents a fair question for the decision of a referee; and it is a most salutary rule that the decision of a referee, upon a question of fact—especially of fraud—where there is evidence on both sides, and the point is not entirely free from doubt, cannot be disturbed. *ib*

REPLEVIN.

In an action of replevin, by a party having a lien, the plaintiff, as in other actions of replevin, is entitled to a return of the property, and if a return cannot be had, to its value. *Dows v. Rush*, 157

S

SCHOOL TAX.

See COMMON SCHOOLS.

SET-OFF.

See VENDOR AND PURCHASER, 9.

SHERIFF.

1. Where a sheriff dies, while in office, after having taken a bond for the jail liberties from a person imprisoned upon a *ca. sa.*, and a new sheriff is thereupon appointed, and a certificate of his appointment signed by the county clerk, is served upon the under sheriff, such prisoner, and the bond for the jail liberties, must be assigned by the under sheriff to the new sheriff, within ten days, or the prisoner will be at liberty to go at large. After the expiration of that period, the new sheriff has nothing to do with the prisoner, and the power of the under sheriff is at an end. *Ridgway v. Barnard*, 613

2. Hence, no action can be maintained, upon the bond, by an assignee of the under sheriff, by virtue of an assignment executed after the expiration of the ten days. *ib*

SLANDER.

In an action for slander, or libel, the pecuniary circumstances of the defendant are not involved in the issue, and evidence showing him to be rich or poor ought not to be received. *Palmer v. Haskins*, 90

STATUTES.

The intent of a remedial statute, like the intent of an agreement, is to be gathered from the plain language employed in it. *Billings v. Baker*, 343

See TIME.

STOCK.

See PLEADING, 14.

SUBSCRIBING WITNESS.

See WRITTEN INSTRUMENTS.

T

TAXES AND TAXATION.

1. As respects taxation, corporations not created by the laws of this state are to be regarded as non-residents; and if they transact business within this state they are to be assessed and taxed on all sums invested in any manner in such business, the same as if they were residents of this state. *International Life Assurance Society v. Commissioners of Taxes*, 318
2. Thus where a foreign insurance company deposits with the comptroller of this state, for the benefit of policy-holders, the securities required by chapter 463 of the laws of 1853, to enable it to do business here, the securities so deposited are liable to assessment and taxation. *ib*
3. But if any portion of the fund so deposited with the comptroller is in-

vested in the stock of the United States, that portion is not taxable. *ib*

TENANTS IN COMMON.

1. Although no action at law will lie, at the suit of one tenant in common, against another, in respect to the common property, without proving a loss, destruction or sale of the property by the defendant; and although no action at law can be maintained by one tenant in common, for the *partition* of such property, yet a court of equity is competent to give relief in such cases, by decreeing a partition of the property, or a sale thereof where partition is impracticable, and a division of the proceeds. *Tinney v. Stebbins*, 290

TIME.

1. In the computation of time under a statute, the day from which a specified number of days is to be counted, is to be excluded, and the day on which the period expires is to be included. *People v. New York Central Rail Road Company*, 284
2. Thus where a statute declared that certain penalties incurred by rail road companies, should be sued for *within ten days* after the same were incurred, *Held* that an action for penalties incurred on the 20th of December, was properly brought on the 30th of that month. *ib*

TRUSTS.

See ALIENS.

U

UNDERTAKING.

See INJUNCTION, 7, 8, 9.
PRINCIPAL AND AGENT, 4.

USURY.

- A corporation cannot recover back usurious premiums paid by it on the loan or forbearance of money. *Butterworth v. O'Brien*, 187

V

VARIANCE.

1. Facts may be averred, in a pleading, according to their legal effect; but facts appearing on the trial, directly different from those averred, will be deemed a variance, although, if properly pleaded, they also would have constituted a good defense. *Gasper v. Adams*, 441
2. In an action upon a promissory note, the answer set up the defense of usury on the part of the plaintiff in exacting more than seven per cent on a loan of money, or on giving a further day of payment. The proof was that the makers, being indebted to the plaintiff upon a promissory note, which they were unable to pay at maturity, and being pressed for payment, requested an extension of the time of payment, which the plaintiff's agent refused to grant, unless the makers would give a new note, with two additional indorsers, and pay certain of the said agent's expenses in going to see the makers and of waiting for the new note. This was agreed to, and the note sued on was given for the amount of the principal of the old note, and the expenses of said agent; *Held* that there was a fatal variance between the answer and the proof. *ib*

VENDOR AND PURCHASER.

1. Of lands.

1. A vendor, selling an equitable estate in lands, and taking the promissory note of the purchasers, for the purchase money, has an equitable lien upon the land for the amount of the unpaid notes, in preference to the claim of voluntary assignees of the purchasers. *Warren v. Fenn*, 333
2. Thus where W. held an equitable title to a lot of land, by the assignment to him of a scrip or surveyor general's certificate of lands owned by the state, by which he was entitled to a deed from the state on the payment of \$1700, and he assigned such certificate to F. & M. for the consideration of \$300, for which amount he took their promissory notes, payable at a future day, and such notes were not paid at maturity, and subsequently F. & M. being in-

solvent, made a voluntary assignment of all their property to the defendants, in trust for the benefit of creditors; *Held* that the plaintiff could enforce his equitable lien upon the land, for the amount of the notes, as against the claim of the defendants. *ib*

2. Of chattels.

3. The plaintiffs contracted to sell to B. 843 barrels of spirits of turpentine, for cash, to be paid upon delivery of the turpentine on board the ship *Victoria*. Before the goods had been paid for, or delivered on board the ship, B. sold the same to W., and the latter, after 529 barrels had been put on board, went to the office of the agent of the ship and representing that the remainder was alongside and would be put on board without delay, and giving the guaranty of a third person to that effect, he procured a bill of lading for 800 barrels, which was signed by C. as master of the ship, and delivered to W. as owner and shipper of the goods. W. indorsed the bill of lading to W., A. & Co., who took the same in good faith and without notice of the plaintiffs' claim and advanced \$10,000 to W. upon it. W. having failed, before the turpentine had been paid for, the plaintiffs applied to C. the master of the vessel, for a bill of lading, which was refused; C. stating that he had already given a bill to W. A demand of the goods was then made by the plaintiffs, and refused. *Held* that the actual delivery of the goods on board ship, by the plaintiffs under the contract of sale without notice of ownership, or that the price had not been paid, and without taking receipts or a bill of lading, and the subsequent execution of the bill of lading to W. and his indorsement thereof to W., A. & Co., freed the goods from the plaintiff's right to resume the possession of the same for the non-payment of the price. *Blossom v. Champion*, 217

4. *Held, also*, that as between the plaintiffs and the bona fide indorsees of the bill of lading, the plaintiffs' delivery under the contract of sale must be deemed to have been absolute and unconditional. *ib*

5. *Held, further*, that the plaintiffs had not a right to resume the possession

of the goods without paying, or offering to pay, the moneys in good faith advanced by W., A. & Co., to W. on the bill of lading. *ib*

6. And that, as against C., the master of the ship, they were not entitled to a delivery of the goods without indemnifying him against his liability under the bill of lading. *ib*

7. Where goods are purchased for cash on delivery, that is, the price to be paid within ten days, the very terms and import of the arrangement are that there is to be a qualified delivery, which is to precede payment. *Dows v. Dennistoun*, 393

8. An understanding, arrangement or custom that the possession of the goods shall be intrusted to the vendee for the purpose of enabling him to realize upon them, and thus provide the means for the payment of the price, cannot be construed into an absolute transfer of the title to the property, as between the original parties to it, or persons having no greater equities than the original parties. *ib*

9. And if, under such circumstances, the goods are delivered to the purchaser, on board a vessel, and he receives a bill of lading therefor, which, together with a bill of exchange drawn upon it, he transfers to third persons, before he has himself paid for the goods, upon an agreement that such third persons shall pay the amount of the bills within ten days, the latter cannot, as against the original vendors, set off against the bills the amount of debts owing to them by the purchaser. *ib*

10. The defendants had recovered a judgment against a manufacturing corporation doing business in the state of New Jersey, the execution issued on which had been levied upon the personal property of the company, at the factory, and was the oldest lien thereon. The plaintiff, who was the managing agent and secretary of the company, with knowledge of these facts, entered into a contract with H., the president of the company, for the purchase of a part of the machinery in the fac-

tory for the price of \$1000, and gave his note for that sum, at four months. The defendants thereupon gave him an order, addressed to the sheriff, who had levied upon the property of the company, under their execution, as well as under others junior in date, directing him to deliver to the plaintiff the machinery which he had purchased; the plaintiff saying that such order was all he required, and that he could get the property upon it. The sheriff disregarded the order, and refused to deliver the property upon it, because of the lien of the junior executions. *Held* that, under the circumstances, there was no warranty of title; that the defendants had done all they agreed to do, in respect to a delivery of the property; and that no action would lie against them, for the non-delivery; the note given for the price not having been paid, and being produced for cancellation, on the trial. *Hopkins v. Grinnell*, 533

VERDICT.

1. A verdict subject to the opinion of the court can be ordered only where the trial presents *questions of law* alone. *Whitaker v. Merrill*, 526
2. In order to justify such a disposition of the case, at the circuit, the facts must all be agreed upon, or found by the jury, or established by *conclusive* evidence. *ib*
8. If there is no question of fact, in the case, such a verdict may be ordered; but if there be one, however strong the evidence may be, upon it, provided, from the nature of the case evidence would be admissible to rebut or overcome it, the question should be submitted to the jury to pass upon, with proper instructions from the court. *ib*

W

WARRANT.

Where a warrant, issued by a justice of the peace, recited a complaint against *John R. Miller*, for a felony, and commanded the officer to arrest "the said *William Miller*;" *Held* that the warrant afforded no justifi-

cation to the officer for the arrest of *John R.*; although it was proved that he was the person intended. *Miller v. Foley*, 630

WILL.

1. A testator, by the first section of his will, fully authorized and empowered his executors "or such one or more of them as may prove this my will, and the survivors and survivor of them, to sell and convert into money all my estate, real and personal whatsoever, and wheresoever, (except my present homestead and lands hereinafter devised to my wife,) and either at public or private sale, and upon such terms as they may think most conducive to the interest of my estate; and to make, execute and deliver good and sufficient deeds and conveyances therefor, to the purchaser thereof." It appearing, from the whole will, to have been the intention of the testator to have the real estate converted into money; and the most important purposes and provisions of the will appearing to call for such conversion, and to be incapable of execution without it; *it was held* that in construing and giving effect to the will, the power to sell must be considered as having been exercised, by the executors, and the real estate as converted into money. *Phelps v. Phelps*, 121
2. Although there was no express direction, in the will, to sell, yet as the execution of the power to sell was not made expressly to depend on the will of the executors, it was therefore imperative. *INGRAHAM, J., dissented.* *ib*
3. The testator, by the 9th clause of his will, gave and bequeathed to each of his children, who should be living at the end of ten years after his decease, the sum of \$100,000, provided his son A. G. or his son-in-law D. should either of them be living; but in case they both should die before that time, then he gave \$100,000 to each of his children, who should be living at the death of the survivor of them. By other clauses of the will legacies were given to various persons, and to religious societies, payable in ten annual installments, commencing in three,

five and seven years. By the 20th clause, the testator declared that after paying and satisfying or providing for the payment of the legacies and bequests, in full, as to all the rest, residue and remainder of his estate, he gave, devised and bequeathed the same to his children and grandchildren, as follows: he ordered and directed the same to be divided into as many shares as he should have children and grandchildren living at the end of ten years after his decease; provided A. G. or D. should either of them be living at that time. But if, before the expiration of ten years from his death, A. G. and D. should both die, then at the decease of the survivor of them, he ordered and directed his said residuary estate to be divided into as many shares as he should have children and grandchildren living at the time of the decease of such survivor; it being his intention that each child and grandchild should be placed upon an equal footing, as to the said residue, and each child and grandchild receive one equal share of his residuary estate, upon such division, as soon thereafter as could conveniently be done. By the 21st clause, the testator directed that in case his wife should die before the division of his residuary estate, the fund reserved by the executors to secure an annuity to her should fall into the bulk of his estate, and form a part of such residue; but in case she should live beyond that period, then the annuity fund should, at her decease, be divided into as many shares as he should have children and grandchildren living at her decease; and that each then living child and grandchild, in respect to said fund, should stand upon an equal footing, and each receive one equal share thereof. *Held*, 1. That by the residuary clause the testator did not intend to give the residuary estate to his children and grandchildren living at the time of his death, absolutely, subject to be divested &c., *to be paid* at the end of ten years or sooner, if the life nominees both died before; but that he intended to give it only to such children and grandchildren as should be living when the residue should be divided; and that, consequently, the legacies were executory and contingent. And so as to the legacies of \$100,000 given to each of

the children, by the ninth clause. 2. That although during the trust and until the contingent future interests should vest, there was a suspension of the power of absolute disposition of the bulk of the estate, and was intended to be, yet that such suspension was not unlawful, inasmuch as the division of the estate must take place either at the expiration of the two lives mentioned, or within the continuance of at least one of the lives. 3. That if the widow should die before either of the residuary life nominees, and her annuity fund should fall into the bulk of the estate, and be divided before the end of the ten years, on the death of the survivor of the life nominees, under the residuary clause, the alienation of the fund would have been suspended for three lives. That the first limitation over of the widow's annuity fund was therefore void. 4. That the limitation over of the widow's annuity fund, to the children and grandchildren living at the decease of the widow, in case she should die after the division of the residue, contained in the 21st clause of the will, was valid. 5. That no direction or provision of the will was void as involving an illegal restraint of the absolute alienation of any part of the estate; except the first limitation of the 21st clause. 6. That there was no unlawful accumulation, directed or involved, in the provisions of the will. *INGRAHAM, J. dissented.*(a) 7. That the whole will was valid, except the first of the alternative limitations over of the widow's annuity fund, in the 21st article, and (with that exception) should be carried into effect, so far as related to any objections made to it on those grounds. *4b*

4. The testator, by the 17th clause of his will, referred to a scheme on the part of the friends of African colonization, to erect and found a college in Liberia, Africa; and declared that if the enterprise should proceed and \$100,000 should be raised for

(a) *INGRAHAM, J.* dissented from so much of the decision in this case as holds that the bequest of the residuary personal estate is valid; holding that the direction to invest the personal estate and the proceeds of the real estate for the payment of legacies at ten years thereafter, or any future period, necessarily produced an accumulation for the benefit of persons not minors, and was therefore void.

the purpose, in this country, then and in such case he gave to his executors the sum of \$50,000, to be applied by them in such way as should in their judgment best effect the object; wishing his executors especially to have in view the establishment of a theological department in said college, to be under the supervision of the Union Theological Seminary in the city of New York. *Held* that this bequest was void; the object of the charity, the mode of applying it, and the time when it should take effect, being so uncertain and indefinite that the trust could not be enforced by the court. *ib*

5. A testator, by his will, gave to each of his children one of the shares into which he had directed his estate to be divided, the interest and income of which was to be applied to their support and education during their minority, and upon his son or sons, respectively, arriving at the age of 21 years, their shares were to be paid over to them. The will then directed that the principal sums bequeathed and devised to his children should *vest in them*, respectively, when and as they should respectively arrive at *the age of twenty-one*, and *not before*; provided that if either of his children should die before attaining the age of 21, leaving issue, such issue should stand in its parent's place, had the latter lived to attain the age of 21. In case of the extinction of all the lineal descendants of the testator at any time before all or any of his estate so devised should have vested in interest, the testator gave the same, or so much as might not then have vested in interest, to his father, if living; if not, then to his uncle, if living; if not, then to the heirs male of his uncle. The entire estate left by the testator consisted of personal property. He died in July, 1835, leaving a widow, a daughter C., and two sons, A. F. and E. G. The said A. F. died in April, 1846, aged nearly 13 years, and leaving no issue. C. the daughter, and E. G. the other son, were now each of the age of 21 years and upwards. The widow of the testator was still living. *Held*, 1. That the share of A. F. vested in him, *in interest*, on the death of the testator; and that having so vested on his death without issue, the

same was to be distributed in equal shares to his mother and surviving brother and sister, under the statute of distributions; to take and hold absolutely, in their own right. 2. That by the declaration, in the will, that the principal sums bequeathed to the children should vest in them, respectively, when and as they should arrive at the age of twenty-one, and not before, the testator must be presumed to have meant *vest in possession*. 3. That the limitation over to the father, and uncle of the testator, and in case of the uncle's death to the male heirs of the uncle, by its very terms could not take effect until after the expiration of three lives in being at the death of the testator, and was therefore void. *Thompson v. Thompson*, 432

6. A testator by his last will directed that on his youngest child coming of age one third part of his estate should be set apart and invested for the use of his wife during her life, and at her death it was to be divided among his children. The "residue" of his estate he also directed to be divided among his children. The provision in favor of the widow was not declared to be in lieu of her dower. *Held* that the widow was not bound to elect between her dower and the provision made for her by the will, but was entitled to both. CLERKE, J. dissented. *Mills v. Mills*, 454

7. A testator, who was a resident of the state of Connecticut, and domiciled there, made his will in that state, and died there in October, 1848, leaving a widow and four children, one son and three daughters, all minors at the time of his death. A portion of his estate consisted of a leasehold interest in two houses and lots in the city of New York, stock in an insurance company, and promissory notes against persons and firms in the city of New York. By his will, the testator, after giving and devising to his wife his homestead, furniture, books, carriages, &c., and to his daughter C. a piano-forte, and an annuity of \$700 to his wife, gave and devised all the residue of his estate to his executors, *in trust*; two-fifth parts thereof for the sole use and benefit of his son, J. H., and *his heirs* and assigns for

ever; and the remaining three-fifth parts thereof for the sole use and benefit of his three daughters, in equal shares, to them respectively, and their respective heirs and assigns for ever. The testator then declared how, and in what manner, the trustees were to apply and dispose of the trust fund for the use and benefit of his children and their issue. During their minority, respectively, the trustees were directed to expend, for their support respectively, such sums as might seem expedient; charging the sums expended for each towards his or her share of the estate. The trustees were directed to pay his son, on his attaining the age of 21 years, \$5000, and a further sum, not exceeding \$5000, if they thought it would be for his interest. On his attaining the age of 23 years, they were directed to pay him such an amount as they should deem it most for his interest to receive, not exceeding \$10,000; on his attaining the age of 25, such sums as they should deem it most for his interest to receive, but not exceeding in any year \$10,000; and they were directed so to continue to make such payments, from one period of two years to another, until the share of the son should have been paid. The trustees were to pay to each of the daughters \$2000 on their respectively attaining the age of 21, and every two years thereafter \$2000, until the share of each should have been paid off; but the trustees, in their discretion, after the first payment to the daughters, were authorized to diminish the subsequent payments, provided they used no unnecessary delay in making the ultimate payment of the share of each daughter. If the son should die before receiving his share, leaving no lawful issue, then his share remaining in the hands of the trustees was to be paid over, in equal shares, to the daughters. And if any one or more of the daughters should die before receiving payment of their respective shares, leaving no lawful issue, their shares remaining unpaid were to be paid, two-fifths of each to the son, and the remainder to the surviving daughters. Should any one or more of the children die, leaving lawful issue, such issue should be entitled in equal portions to the share or shares of the respec-

tive parent or parents remaining in the hands of the trustees; but in such case the trustees were to hold and dispose of such share or shares in such manner that such issue only, and their legal representatives, should have benefit or advantage thereof. The executors were directed to sell the real estate in New York and Connecticut, and to add the proceeds thereof to the general fund. No direction was given as to the interest or income of the estate, as distinguished from the principal. *Held*, 1. That the testator intended that the bulk of his estate, real as well as personal, should be converted into money, and invested and kept together by his trustees as one fund; and that out of the same, and its accruing interest or income, the trustees should, from time to time, pay the annuity to the widow; the sums deemed expedient for the support and education of the children during their minority; and as they severally attained the age of 21, to each a certain other sum; and after that, to pay over the residue of the fund or estate in their hands, with its accruing interest, to the children and *their issue*, in certain periodical payments; and in a certain manner in their discretion. 2. That the testator did not intend that his children should have the interest or income of the fund, and the benefits and payments specifically directed by him, in addition; but that he intended the interest or income of the fund to be added to the principal, and to be kept together; and that out of this fund, increased by these additions of income or interest, the payments directed by him should from time to time be made. 3. That the whole trust estate was to be considered as converted into money, under the power of sale, and invested by his trustees living in Connecticut; and the will was to be carried into effect, and the rights of parties beneficially interested under it were to be determined according to the laws of that state. 4. That the decree of the surrogate, declaring that the biennial payments directed in the will to be paid to the children of the testator, were applicable alone to the principal or corpus of the estate, and declaring that the children were entitled to, and that the executor should distribute, the net income of

- their shares from the time of the testator's decease, was erroneous, and should be reversed. 5. That the surrogate of New York had no jurisdiction over moneys voluntarily paid to the executor by New York debtors, previous to the granting of letters testamentary by said surrogate; and that the decree of the surrogate, adjudging and decreeing that the executor should account to the surrogate for the assets realized by him from debtors residing in New York before the issuing of letters testamentary was erroneous. 6. That whether the trustees under the will had discretionary power to pay to the testator's son, J. H., out of the trust funds in their hands, at and after he should have attained the age of 25 years, \$20,000 biennially, until his entire share should be paid off, was a question for the courts of Connecticut, where the fund was. CLERKE, J., dissented. *Lyman v. Parsons*, 564
8. A testator, by his will, which took effect prior to the revised statutes, devised as follows: "I give and devise to my two sons, Moses and Abraham, the farm I live upon, to have and to hold to them, their heirs and assigns for ever, they supporting their mother thereon as above directed, and paying my just debts and funeral expenses, to be divided as equal as may be, share and share alike. If either Moses or Abraham should die and leave no lawful issue, then their portion or share of the land shall be equally divided between my son William and the survivor of them." Moses died in 1850, leaving one child, and Abraham died in 1857, leaving a widow, but no issue. *Held* that the limitation over to William was good as an executory devise; that he was entitled to an estate in fee in the one half of the lands devised to Abraham, exonerated from the dower of A.'s widow; and that the remaining half of such lands descended to the heirs at law of Abraham, subject to the dower of his widow. *Weller v. Weller*, 588
9. Where a testator has mind and memory to understand the situation and value of his property, and the condition and situation of those who by reason of their relationship to him have claims upon his bounty, in such case his will must stand for the reason of the act; and it is not sufficient to impeach his competency that the will is not such, in all respects, as might have been expected from one in his situation. *Watson v. Donnelly*, 653
10. A British subject holding lands within the United States, and who, by the treaty of 1794 with Great Britain, was authorized to continue to hold them, and to grant, sell or devise the same *to whom he pleased*, in like manner as if he had been a native born citizen of the United States; and who was within the terms of the stipulation that neither those so holding lands, nor their heirs or assigns, should, so far as respected the said land, and the legal remedies incident thereto, be regarded as aliens, had the right to convey or devise the property to *aliens* as well as citizens. *ib*
11. The power to grant or devise to whomsoever the owner pleased necessarily implied a corresponding ability, on the part of the grantee or devisee, *to take and hold*. *ib*
12. The treaty, by the term "assigns" embraced, in its spirit, all who should succeed to the title of the original owner by any means other than by descent. And it conferred upon the devisee of such original owner, although an alien, all the rights which he could have had if he had become naturalized. Consequently such devisee could grant or devise the land to any one competent to take. *ib*

WITNESS.

1. The section of the code which limits the right of examining a plaintiff as a witness, to cases in which the adverse party or person in interest is living, should be so construed as to admit a person who has an action with a corporation, to be a witness in his own behalf. *Wright v. New York Central Rail Road Co.*, 80
2. Notwithstanding the present constitution makes all persons *competent* witnesses, whether they be believers in a Supreme Being, or atheists or infidels, yet a party against whom a witness is called may interrogate

him, on his cross-examination, as to his opinions on matters of religious belief, and show by him that he does not believe in the existence of a God who will punish false swearing. *Stanbro v. Hopkins*, 265

3. And it is not erroneous for the judge to charge the jury that the fact thus proved will go to the *credit* of the witness. *ib*

WRITTEN INSTRUMENTS.

1. In order to prove the execution of an attested instrument, the subscrib-

ing witness must be called, if he can be produced, and is capable of being examined. *Jones v. Underwood*, 481

2. The reasons for this rule, stated by CLERKE, J. *ib*
3. The testimony of the party executing the instrument cannot be received, as a substitute for that of the subscribing witness. *ib*
4. The change in the law, which allows parties to be witnesses, does not alter the rule, or afford any rule for dispensing with its observance. *ib*

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